Bay Metal Cabinets, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Cases 7–CA–26062, 7–CA–26359, 7–CA–26573, and 7–RC–18231

March 22, 1991

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On April 27, 1988, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions[1] and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified, and to adopt the recommended Order.

1. The Respondent contends in its exceptions that on December 31, 1986, the Regional Director for Region 7 dismissed a charge allegation in Case 7–CA–26359 which alleged that on October 9, 1986, the Respondent unlawfully changed employees' terms and conditions of employment by promulgating a personnel manual in retaliation for the employees' exercise of protected activities. The Respondent contends that this dismissal as to the promulgation of a personnel manual requires dismissal of certain complaint allegations described below.

The record developed at the hearing does not include the dismissal letter, nor establish its existence. However, the Respondent attached to its exceptions a copy of a purported dismissal letter dated December 31, 1986, from the Regional Director, which it contends is authentic. Because the letter was not submitted at the hearing, the General Counsel filed a motion to strike the attachment on the basis that it is not part of the record and does not constitute newly discovered or previously unavailable evidence.

On January 3, 1991, the Board issued a Notice to Show Cause why the Board should not consider the attachment to be a copy of an authentic dismissal letter (Member Cracraft dissenting). In response to the Notice to Show Cause, the General Counsel admitted that the attachment was an authentic dismissal letter. The General Counsel contended, however, that the dismissal letter did not encompass, and did not dispose of, the allegation asserted in the complaint that the Respondent unlawfully distributed overly broad no-solicitation and no-distribution rules.

According to the General Counsel, although the offending overly broad rules were contained in the personnel manual noted in the charge, only the ''8(a)(3) aspect of the substantive allegation'' was dismissed, i.e., the allegation that the personnel manual was promulgated for retaliatory purposes to squelch union activities, an allegation based on improper motivation. According to the General Counsel, the complaint allegation pertaining to the breadth of the rules was alleged to be unlawful without regard to motive. The General Counsel's position, as set forth in the response to the Notice to Show Cause, is that the separate retaliation allegation, turning on improper motivation no longer raises any remedial issues affecting this proceeding. Thus, the General Counsel contends that ''[s]ince the 8(a)(3) allegation [as to retaliatory motivation] adds nothing to the remedy if the rule violated 8(a)(1), it is unnecessary to reach any issues presented by the 8(a)(3) allegation.''

Because we find, as described below, that the dismissal letter, even if considered at this stage of the proceeding, did not address or dispose of the allegation that the no-solicitation and no-distribution rules simply were overbroad, without regard to motive, we find it unnecessary to reach the question of whether the dismissal letter should be admitted at the exceptions stage or whether its proffer should be stricken. Further, we find, by virtue of representations contained in the response to the Notice to Show Cause, that the General Counsel effectively has abandoned pursuit of a violation turning on improper motivation, i.e., that the rules were promulgated for retaliatory purposes to squelch union activities. Accordingly, we find it unnecessary to pass on that issue, and we reach only the issue of whether the Respondent distributed overly broad rules in violation of Section 8(a)(1). For the reasons below, we adopt the judge's finding that the Respondent violated the Act in this respect.[3]

On November 5, 1986, the Union filed a charge in this proceeding (Case 7–CA–26359) alleging, inter alia, that on October 9, 1986, the Respondent unlawfully changed the terms and conditions of employment of its employees by promulgating a ''personnel manual'' in retaliation for employees' exercise of protected

[1] In filing its exceptions the Respondent attached a copy of a December 31, 1986 letter from the Regional Director for Region 7 wherein he dismissed certain aspects of the allegations contained in Case 7–CA–26359. On June 7, 1988, counsel for the General Counsel filed a motion to strike this letter.

[2] The record does not clearly demonstrate the adequacy of Respondent's reinstatement offers nor the extent of Respondent's backpay and reinstatement liability to its second-shift employees who were laid off, discharged, and/or suspended. These matters are properly left for the compliance stage of this proceeding.

[3] The judge's recommended Order and his Notice to Employees are only directed to the overbreadth of the rules. Accordingly, we find it unnecessary to modify the Order or issue a new notice. We shall, however, issue amended Conclusions of Law to reflect the violation found.

concerted activities.[4] On December 31, 1986, after investigation of the charge, the Regional Director took the following formal action. The Regional Director issued an order consolidating cases, first amended, consolidated complaint and notice of hearing alleging, inter alia, that the Respondent violated Section 8(a)(1) by distributing a personnel manual in early October 1986 containing overly broad no-solicitation and no-distribution rules.[5] That same day, December 31, 1986, the Regional Director issued a partial dismissal letter stating, inter alia, that ''further proceedings are not warranted at this time with regard to the [allegation] involving . . . the promulgation of a Personnel Manual.'' The Regional Director indicated that ''[t]he remainder of the charge is unaffected by this partial dismissal letter.''

Following issuance of the first amended complaint, the Respondent filed an answer. In its answer, the Respondent denied that the no-solicitation and no-distribution rules were impermissibly overly broad in violation of the Act. The Respondent's answer made no mention of a partial dismissal letter, nor did it contend that any aspect of the first amended complaint had been dismissed previously.

Thereafter, on March 9, 1987, following the filing and the investigation of yet another charge (Case 7–CA–26573), the Regional Director issued a second amended consolidated complaint. That complaint, once again, alleged that the no-solicitation and no-distribution rules were impermissibly overly broad. However, it also alleged, in the same paragraph, that the rules were promulgated for retaliatory purposes ''to squelch the union activities of its employees.'' In its answer to the second amended consolidated complaint, the Respondent contended, for the first time, that the Regional Director was seeking to litigate a matter that previously had been dismissed. Thus, the Respondent's answer asserts that ''[o]n December 31, 1986, after a full investigation of the Charge concerning this aspect of the case, Regional Director Bernard Gottfried dismissed the Complaint as alleged in this particular paragraph.''

Assuming, arguendo, without deciding, that the dismissal letter of December 31, 1986, can properly be considered for the first time at the exceptions stage, the question arises: did the Regional Director dismiss an allegation that the rules were overly broad and then seek to issue a complaint alleging that same conduct, thereby raising issues under Section 10(b)?

Our review of the charge in Case 7–CA–26359, the partial dismissal letter, the first amended complaint, the second amended consolidated complaint, and the Respondent's answers to the complaints convince us that the allegation of overbreadth was not encompassed within the partial dismissal letter of December 31, 1986. The overbreadth allegation, implicitly contained in and raised by the charge's reference to the promulgation of a personnel manual, which included the offending no-solicitation and no-distribution rules, remained viable.

When the Regional Director dismissed one aspect of the charge, the 8(a)(3) allegation ''involving . . . the promulgation of a 'Personnel Manuel [sic]''' for retaliatory purposes, he issued a complaint on the other aspect, the allegation that the Respondent violated Section 8(a)(1) by distributing overly broad no-solicitation and no-distribution rules. Thus, there is no inconsistency between the Regional Director's issuance of the first amended consolidated complaint (that the rules were overbroad) and his dismissal on the same day of a different allegation (that a personnel manual was promulgated for retaliatory purposes to squelch union activities).

Certainly, it is evident that the Respondent was aware that there had been no dismissal pertaining to overly broad no-distribution and no-solicitation rules. That proposition is shown by the Respondent's failure to make mention in its answer to the first amended complaint of any purported dismissed allegations. Indeed, it was only when the Regional Director included an allegation of retaliation to ''squelch'' union activities in the second amended consolidated complaint, issued over 2 months later, that the 'Respondent raised the defense that the Regional Director sought to revive a dismissed allegation.[6] That defense went to ''retaliation,'' not to ''overbreadth.''

In short, our scrutiny of the sequence of formal pleadings, as well as the dismissal letter, taken as a whole, reveals that the Respondent's defense that the Regional Director has sought to resurrect a dismissed charge allegation applies only to the retaliation allegation raised in the second amended consolidated complaint.[7] It does not apply to the overbreadth allegation because that allegation was not encompassed within the Regional Director's dismissal letter. Because overbreadth was never dismissed, there was no ''need'' to revive it; it was pursued by the Regional Director from the very beginning. As we agree with the judge's finding that the no-solicitation and no-distribution rules were, in fact, overly broad as alleged,

[4] The Union previously had filed a charge in Case 7–CA–26062 pursuant to which the Regional Director issued a complaint alleging violations of Sec. 8(a)(3) and (1).

[5] The first amended complaint did *not* allege that the rules were retaliatory in purpose.

[6] The Respondent had a rational basis to reach that conclusion in view of the General Counsel's admission, in its response to the Notice to Show Cause, that the ''Respondent is at least correct to the extent that this 8(a)(3) aspect of the substantive allegation was earlier dismissed, at least by implication.''

[7] As noted above, the General Counsel's position in response to the Notice to Show Cause is that it is now unnecessary to reach any issue involving a retaliatory motivation pertaining to the promulgation of no-solicitation and no-distribution rules. Accordingly, it is unnecessary to reach the allegation in the second amended consolidated complaint, now abandoned, that the Respondent promulgated these rules for retaliatory purposes to ''squelch'' union activities.

we affirm the judge's finding that the Respondent violated Section 8(a)(1) in that respect.[8]

2. In its exceptions, the Respondent also takes issue with the judge's recommended Order requiring reinstatement and backpay for employees William Trask, Anthony Fuhrman, Ross Dean, and Kenneth Trask, all of whom were unlawfully laid off on July 14, 1986. The Respondent contends that William Trask declined an offer of reinstatement in September 1986 and that Anthony Fuhrman voluntarily quit his job in October 1986. On the basis of the record before us, we cannot resolve the merits of these contentions. They thus raise matters properly left to the compliance stage of this proceeding.

The Respondent also contends that the judge's finding that Ross Dean was lawfully discharged on November 26, 1986, and that Kenneth Trask was lawfully, permanently laid off on November 1, 1986, should limit their reinstatement and backpay rights. (The General Counsel does not contest these findings.) We agree. Consequently, reinstatement rights and backpay for these two employees, insofar as they relate to the July 14 layoff, will be cut off as of their respective subsequent lawful discharge or layoff.

The Respondent also excepts to the inclusion of employees Robert Richards, Gary Cygan, and Terry Shawl in the unlawful layoff of all night-shift employees in December 1986, on the ground that the charges were dismissed as to them by the Regional Director's December 31, 1986 dismissal letter in Case 7–CA–26359. With respect to Shawl, we find no merit to this exception because the dismissed charge allegation concerning him related to his alleged suspension before the December layoff. Further, the complaint does not contain an allegation relating to Shawl's suspension nor was that issue litigated before the judge as an unfair labor practice. Similarly, the charge allegations that Richards and Cygan were discriminatorily discharged relate to events occurring before the December layoff and there is no reference in the complaint to either of these employees by name. To the extent, however, that either or both were reemployed before the December layoff and were affected by the layoff, the complaint covers them and the dismissal of unrelated charge allegations is immaterial. Such matters, and any others relating to the identity of the employees affected by the termination of the night shift and the extent of the Respondent's reinstatement and backpay liability with respect to such employees, shall be determined at the compliance stage of this proceeding.

[8] Our dissenting colleague contends that the ''overbreadth'' allegation is barred under Sec. 10(b). His analysis rests on the notion that the Regional Director, on December 31, 1986, simultaneously dismissed *and* issued complaint on the allegation that the Respondent distributed a personnel manual containing overly broad no-solicitation and no-distribution rules. Our dissenting colleague is able to reach the conclusion that the Regional Director acted in this contradictory fashion by giving controlling weight to the wording of the charge and the dismissal letter, without giving what we think is due regard to surrounding circumstances, including the entire sequence of pleadings and formal actions, as described above, particularly the timing and contents of the first amended complaint. Further, our dissenting colleague finds it necessary to speculate that the Respondent may not have timely received a copy of the dismissal letter, even though the Respondent makes no such contention. Indeed, we note that copies of a dismissal letter are routinely sent to charged parties at the same time the original letter is sent to the charging party. See Casehandling Manual (Part One) ULP, sec. 10122.3. Finally, our dissenting colleague contends that the Regional Director dismissed both aspects of the charge (overbreadth and retaliation) because the dismissal letter referred to ''promulgation.'' In point of fact, the letter's reference to promulgation supports the notion that only the retaliation aspect of the charge was dismissed. The face of the charge referred to promulgation in terms of retaliation. The dismissal letter tracked the wording of the charge in this respect, thereby leaving intact the matter of overbreadth that was alleged in the complaint that issued on the same day as the dismissal letter.

AMENDED CONCLUSION OF LAW

Substitute the following for the judge's Conclusion of Law 3:

''3. By threatening its employees that organizing a union would be futile; threatening its employees with discharge because of their continued involvement in union organizing activities; threatening its employees with plant closure if a union successfully organized its Bay City place of business; threatening its employees with termination by telling them that other employees who had engaged in union activities had been discharged; threatening its employees that it would cease operations and later reopen under a different name in the event they selected a collective-bargaining representative, thereby conveying the impression that support for the Union or any labor organization would be futile; threatening its employees by telling them that they should not be wearing badges bearing union slogans or logos and interrogating them concerning their wearing of prounion emblems and about how they would vote in a union representation election; and distributing personnel manuals containing overly broad no-solicitation and no-distribution rules, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bay Metal Cabinets, Inc., Bay City, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election in Case 7–RC–18231 is set aside and the case is remanded to the Regional Director for Region 7 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative, as directed below.

[Direction of Second Election omitted from publication.]

MEMBER OVIATT, dissenting in part.

Contrary to my colleagues, I conclude that Section 10(b) of the Act precludes finding any violation concerning the content or distribution of the Respondent's ''Personnel Manual.''

On November 5, 1986, the Union filed a charge in Case 7–CA–26359, alleging violations of Section 8(a)(1), (3), and (4). In pertinent part, the charge alleged that

> On or about October 9, 1986 the above-named Employer changed terms and conditions of employment of its employees by promulgating [a] ''Personnel Manual.'' This was done in response to, and in retaliation for, the protected concerted activities of employees.[1]

By letter dated December 31, 1986, the Regional Director notified the Charging Party that portions of that charge were being dismissed. The pertinent language of that letter states:

> As a result of the investigation, it appears that further proceedings are not warranted at this time with regard to the allegations involving the suspension of Terry Shawl, discharges of Robert Richards and Gary Cygan, and the promulgation of a ''Personnel Manual.'' I am, therefore, refusing to issue complaint in this matter with regard to these allegations. The remainder of the charge is unaffected by this partial dismissal action.[2]

On the same date as the dismissal letter, the Regional Director also issued an amended consolidated complaint that alleged, inter alia, that the personnel manual contained overly broad prohibitions on solicitation and on the distribution of literature. The Respondent in its answer denied the allegations.

On May 9, 1987, after another charge was filed in Case 7–CA–26573 alleging that the Respondent violated the Act by permanently laying off its second shift, and by refusing to bargain, the Regional Director issued a second amended consolidated complaint. That complaint alleged in part that in early October 1986 the Respondent distributed a ''Personnel Manual'' containing overly broad prohibitions on solicitation and distribution of literature, ''in order to squelch the Union activities of its employees.'' In its answer to the second amended consolidated complaint the Respondent denied this allegation and, having apparently by then received a copy of the Regional Director's dismissal letter, interposed it as a defense.[3]

The judge found the violations. In its exceptions to the Board, the Respondent again raised the Regional Director's dismissal letter, attaching a copy to its exceptions. The General Counsel's brief to the Board treated that contention in a single sentence:

> Respondent's assertion in its exceptions that this aspect of the charge was ''dropped'' in a letter from the Regional Office, is not supported by any record evidence, nor is it a reasonable conclusion in view of the Complaint issued, to draw from the document attached to its exceptions. [Sic.]

The General Counsel also filed a motion to strike the attachment of the Regional Director's dismissal letter on grounds that it ''was not offered or admitted at the unfair labor practice hearing and therefore is not part of the record . . . .''[4]

On January 3, 1991, the Board issued a Notice to Show Cause why the Board should not consider ''Attachment A'' of the Respondent's exceptions to be a copy of an authentic dismissal letter emanating from the Regional Director of Region 7, and if so, why the Board should not consider the letter as disposing of all matters referred to in paragraphs 8(h)(i)(j) of the complaint. [Chairman Stephens and Member Oviatt; Member Cracraft dissenting.]

In response to the Notice to Show Cause, the General Counsel admitted that the dismissal letter was authentic, but argued that although the allegedly overly broad no-solicitation and no-distribution rules were contained in the personnel manual referred to in both the charge and the dismissal letter, only the ''8(a)(3) aspect of the substantive allegation'' was dismissed, The Counsel further contends that ''since the 8(a)(3) allegation (as to retaliatory motivation) adds nothing to the remedy if the rule violated 8(a)(1), it is unnecessary to reach any issues presented by the 8(a)(3) allegation.''

It is settled that the Board cannot issue a complaint on a charge that has been dismissed. *Redd-I, Inc.*, 290 NLRB 1115 (1988); *Heaven*, 290 NLRB 1223 (1988). The dismissal letter states precisely that ''Further proceedings are not warranted at this time with regard to the allegations involving . . . the promulgation of a 'Personnel Manual.'''' (Emphasis added.) Plainly, these are all the allegations involving the personnel manual, not just some. I find, based on the clear language of the Regional Director's dismissal letter, that all aspects of the charge pertaining to the personnel manual were dismissed in this case. Accordingly, I conclude that the

[1] The charge also alleged that the Respondent reduced the wage of one employee in retaliation for organizing activities and for filing charges with the Board, and that the Respondent suspended and/or terminated seven employees in retaliation for organizing activities.

[2] The ''unaffected'' portions of the charge included allegations concerning the reduction in wages of Ross Dean and the suspension and/or termination of employees Kelly, Winters, Morse, and Savage.

[3] There is no evidence that the Respondent had a copy of the dismissal letter at the time it filed its answer to the first amended consolidated complaint.

[4] Contrary to the General Counsel's argument, I find that the dismissal letter was put in issue in the Respondent's answer to the second amended consolidated complaint.

personnel manual aspect of the complaint should be dismissed in its entirety.

My colleagues maintain, however, that the ''overbreadth allegation,'' implicitly contained in and raised by the charge's reference to the promulgation of the personnel manual, remained viable. I cannot agree.

First, if the Regional Director had intended to differentiate between aspects of the charge pertaining to the personnel manual, he could have done so, but he did not. Indeed, his dismissal letter gave absolutely no indication that he was parsing that aspect of the charge. This stands in stark contrast to the fact that he *did* differentiate in regard to *other* aspects of the charge concerning the reduction in wages of employee Dean, and the suspension and/or terminations of the seven named employees. Second, assuming for the sake of argument that the charge as it pertained to the personnel manual alleged two different aspects, i.e., (a) promulgation and (b) retaliation, I note that the dismissal letter itself refers to the promulgation.

In my view, once the Regional Director dismissed the ''Personnel Manual'' portion of the charge in its entirety, the decision to issue a complaint does not salvage any aspect of the personnel manual allegation, for a dismissed charge cannot be resurrected in a complaint. I note also that this is not a case in which the complaint allegation is preserved either by another charge or by the Board's ''closely related'' doctrine. Cf. *Redd-I Inc.*, supra. Here, there is no other charge that refers to any aspect of the personnel manual, nor is that matter closely related to any other aspect of these cases, and nor can the personnel manual allegations be salvaged on the theory that the Regional Director ''made a mistake.'' Either the charge was dismissed or it was not dismissed. Here, the Regional Director's letter on its face clearly dismissed the allegations regarding the personnel manual.

Even assuming that there was some ambiguity as to the Regional Director's intention, I find that the Respondent's defense in its answer based on the Regional Director's own dismissal letter sufficed not only to put in issue the legal sufficiency of those allegations of the complaint, but also to shift the burden to the General Counsel to contest the Respondent's reliance on the letter. Because the General Counsel's representative was the author of the letter, at the very least it behooved the General Counsel to come forward at the hearing to dispute the Respondent's interpretation of the letter, or to otherwise contest its relevance. The General Counsel failed to do so here, and must therefore bear the consequences.

Accordingly, as I would find the matter barred by Section 10(b) of the Act, I dissent from the majority's 8(a)(1) finding with respect to the personnel manual. I otherwise agree with my colleagues.

Amy Bachelder, Esq., for the General Counsel.
Thomas A. Basil (Luce, Basil & Collins, Inc.), of Saginaw, Michigan, for the Respondent.
Frank McDaniels, of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

WILLIAM F. JACOBS, Administrative Law Judge. The charge in Case 7–CA–26062 was filed on 24 July 1986 by United Steelworkers of America, AFL–CIO–CLC (the Union or the Petitioner). The complaint issued on 5 September 1986, alleging that Bay Metal Cabinets, Inc. (the Respondent, the Company, or the Employer), violated Section 8(a)(1) and (3) of the National Labor Relations Act, by discriminatorily discharging or laying off its employees William Trask, Kenneth Trask, Ross Dean, Robert Jennings, Robert Hopfinger, Brian Wagener,[1] and Anthony Fuhrman, because of their activities on behalf of the Union, and violated Section 8(a)(1) of the Act by threatening its employees with various reprisals because of their engaging in union activities.

The charge in Case 7–CA–26359 was filed on 5 November 1986 by the Union. The first amended consolidated complaint issued on 31 December 1986 alleging, in addition to the allegations contained in the original complaint, that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging or suspending its employees Timothy Winters, Ross Dean, and Curt Sauvage and reducing the wages of its employee Ross Dean because of their activities on behalf of the Union and violated Section 8(a)(1) of the Act by threatening its employees with additional reprisals, interrogating employees concerning their wearing of badges supporting the Union, and prohibiting activities protected under Section 7 of the Act.

The petition in Case 7–RC–18231 was filed on 17 November 1986. Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 7 on 9 December 1986, a secret ballot election was conducted on 13 January 1987. The tally of ballots showed 9 votes cast for the Union, 25 votes cast against the Union, and 21 challenged ballots. Thereafter, the Union timely filed objections to conduct affecting the results of the election. The objections read as follows:

> On or about December 15, 1986, the Company ''permanently'' laid off its afternoon shift in retaliation for the protected organizing activities of the employees working on that shift, and in an effort to chill support for the Union and prevent USWA [the Charging Party] supporters from voting in the January 13, 1987 election.

The charge in Case 7–CA–26573 was filed on 20 January 1987. On 9 March 1987 the Region issued a document entitled:

[1] As corrected in the transcript.

(I) Second Order Consolidation Unfair Labor Practice Cases

(II) Second Amended Consolidated Complaint

(III) Report on Objections and Determinative Challenged Ballots

(IV) Order Consolidating Unfair Labor Practice and Representation Cases for Hearing

(V) Notice of Consolidated Hearing

In section II of this document, the second amended consolidated complaint, all of the allegations contained in the complaints issued earlier were repeated.[2] In addition, however, there was included a new allegation to the effect that Respondent violated Section 8(a)(1) and (3) of the Act by eliminating its second shift and permanently laying off the affected employees in order to discourage union organizing activities and violated Section 8(a)(1) by further threatening its employees because of their union activities. In section III of this document, the Report on Objections and Determinative Challenged Ballots, the Regional Director determined that the issues raised by the objections were identical to those raised by the allegations described in paragraph 10 of the second amended consolidated complaint and that, accordingly, he should order the consolidation of Cases 7–CA–26062, 7–CA–26359, 7–CA–26573, and 7–RC–18231 for hearing before an administrative law judge. Similarly, in the same section of this document, the Regional Director concluded that the eligibility issues should likewise be heard and considered simultaneously by an administrative law judge after which, Case 7–RC–18231 should be transferred to and continued before the Board in Washington, D.C.

These consolidated cases were tried before me on 19, 20, and 21 May and 9, 10, and 11 June 1987, in Saginaw Michigan.

All parties were represented at the hearing and were afforded full opportunity to be heard and present evidence and argument. General Counsel and Respondent filed briefs. On the entire record, including my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Bay Metal Cabinets, Inc.

Bay Metal Cabinets, Inc. (BMC) operates a plant in Bay City, Michigan, where it is engaged in the manufacture and fabrication of conveying systems, sheet metal cabinets, racks, and parts. It also maintains a paint line on which it paints its own manufactured items as well as those manufactured by other companies under contractual agreement. BMC manufactures products and performs services both for end user companies and for other companies who purchase products and services from BMC for resale to other business entities.

Harold C. Baldauf incorporated BMC in 1983. The company's officers are Harold C. Baldauf, president; David J. Baldauf, secretary and treasurer; Janet A. Baldauf, assistant secretary; John Pankow, assistant secretary; and Harold E. Baldauf, vice president. David and Harold E. Baldauf are the sons of Harold C. Baldauf and Janet Baldauf. BMC's officers are also its directors.[3] The Company is owned in equal parts by Harold E. Baldauf, Fred May Jr.,[4] and David Baldauf. Fred May Jr. is the son of Plant Manager Fred May Sr.

Supervisory Issues

Ed Schiattone and Crew Leaders

Respondent takes the position that the only supervisors at the plant are Robert Cummings, Fred May Sr., Harold E. Baldauf,[5] and Harold C. Baldauf. Below these members of management are the crew leaders. Respondent asserts that the crew leaders are not supervisors but merely conduits of orders from Plant Superintendent Cummings to the individual employees on the crews led by the crew leaders, and that Ed Schiattone is merely one of the several crew leaders having no more authority than the other individuals holding that title. General Counsel takes the position that Ed Schiattone is not only a crew leader but also vested with supervisory authority over and above that exercised by the other crew leaders.

Cummings testified, in support of Respondent's position, that there are no supervisors out in the plant; that he gives the work assignments for employees to the crew leaders and the crew leaders then assign employees the jobs. The crew leader can, however, make job assignments to individual employees to fill vacancies due to absenteeism. Cummings testified further that crew leaders have no authority to discharge, discipline, transfer employees from one department to another or from one shift to another, grant raises, or send employees home due to parts shortages. Cummings testified, on a more positive side, that crew leaders have recommended friends or relatives for hire but added that other employees could and have done the same. Cummings stated that sometimes he followed such recommendations and sometimes not; that a crew leader's recommendations for hire carried no more weight than that of any rank-and-file employee. Similarly, crew leaders and rank-and-file employees can and have recommended fellow employees for wage increases.[6] When Cummings is considering an employee for a wage increase he will consult that employee's crew leader in order to see if there is support for his own opinion of that employee.

Cummings emphasized the limitations on crew leader's authority by testifying that although crew leaders would initial

[2] At trial, General Counsel moved to withdraw certain allegations and to add others. General Counsel's motions were granted.

[3] Except John Pankow, who is not listed as a director.

[4] Fred May Jr. is Harold C. Baldauf's son-in-law.

[5] Hereafter Harold E. Baldauf will be referred to simply as Baldauf and Harold C. Baldauf as Baldauf's father.

[6] Cummings offered the example of one of his truckdrivers road testing and recommending another employee for a truckdriver's job. Cummings' example is clearly an exceptional circumstance.

mistakes on the timecards of rank-and-file employees, he, Cummings also had to okay the mistakes later. Moreover, when a decision had to be made on the second shift as to whether or not employees who had insufficient productive work to do should be sent home or given jobs like sweeping to keep them busy, such decisions were made in advance by Cummings. According to Cummings, if an employee on the second shift requested permission to go home early, the crew leader would have to call Cummings at home before granting such a request.[7]

Crew leaders receive 50 cents per hour more than rank-and-file employees. If their duties are as limited as Cummings described, the money appears ill-spent. For this reason, and because I find other witnesses who testified on the subject more credible, I do not credit Cummings' testimony with regard to the crew leaders' duties. Moreover, Cummings was not hired until August 1986 and many, if not most, of the incidents in which Schiattone's involvement is of importance occurred before Cummings was on the scene. No member of management testified concerning the duties of crew leaders during the period prior to Cummings' employment.

Mathew Arnold and Paul Van Dorn, both crew leaders at one time or another, testified concerning their duties while so employed. Arnold, initially hired in August 1985 as a painter on the second shift, transferred in November 1985 to the day shift, then back to nights in January 1986. In November 1986 Cummings made Arnold a crew leader on the paint line on the day shift. Cummings, at the time, told Arnold that, as crew leader, he was to make sure that he had the paint to do the job and to keep everybody working. Arnold testified that, as crew leader, he had no authority to discipline, discharge, transfer employees from one shift to another, or from one department to another nor to grant wage increases. Arnold testified, however, that he could effectively recommend wage increases and did so on at least one occasion when his recommendation was followed and the raise was awarded to the employee for whom it was recommended. As crew leader on the day shift when Cummings was present, Arnold could not independently grant permission to employees to leave work early. He first had to ask Cummings on behalf of the employee. Similarly, Arnold could grant future days off to employees only after getting Cummings' permission. As a day-shift crew leader, Arnold could not correct timecard errors. When first made a crew leader on the first shift, Arnold received a 50-cent-per-hour wage increase from $6 to $6.50 per hour. Subsequently, he received another increase to $7 per hour.

Paul Van Dorn, like Arnold, is a first-shift crew leader who performs his duties during the hours that Cummings and other members of higher management are present. In June 1986 Van Dorn made $6 per hour as crew leader. In the fall of 1986 he received a 50 cents per hour wage increase to $6.50 per hour. Subsequently, he was given another 50-cent-per-hour wage increase to $7. At this time the members of his crew received between $4.50 and $6 per hour.

[7] The second shift worked until 3 or 3:30 a.m. Cummings would have us believe that if an employee wished to go home at 1:30 or 2 a.m., his crew leader was expected to call Cummings at home, at this time of night, to obtain his permission before granting the employee's request. I cannot credit such testimony.

Van Dorn testified that, as crew leader, he makes work assignments both at the beginning of the shift and in midshift as necessary. Van Dorn has authority to recommend discipline and was told he had that authority by Cummings when he was first given the job. His crew members must do what he tells them and if they do not follow his orders they can be disciplined.

Van Dorn also has authority effectively to recommend wage increases for his crew members. Again, Cummings told Van Dorn that he had this authority and, indeed, Van Dorn exercised this authority on five separate occasions. In most cases, Van Dorn's recommendations were followed. Van Dorn said that he had no authority to lay off his crew members, that only Cummings could do that. However, Van Dorn also testified that sometimes his crew would run short of material. When that arrived, Van Dorn would send his crew members home. Then, once the needed material arrived, Cummings would ask Van Dorn how many employees would be needed. Van Dorn would advise Cummings what his needs were and Cummings would call the men and have them report. The same thing would happen in situations where a new job was being set up. Cummings would ask Van Dorn how many workers were needed. Van Dorn would tell him, and Cummings would call them back himself. Thus, on recalls, Cummings, not Van Dorn, would choose who should be recalled.

Van Dorn testified that when one of his crew members wanted to take off on a forthcoming weekend for some special occasion, the employee was expected first to talk to Van Dorn about it. If in Van Dorn's judgment the employee had a good attendance record and had a good reason for wanting the day off, Van Dorn would grant the request. If, on the other hand, Van Dorn felt that the request was unjustified, he would send him to Cummings who had the last word on the subject. Van Dorn corrects and initials errors on timecards.

In addition to Cummings, Arnold, and Van Dorn, certain rank-and-file employees also testified regarding the authority of crew leaders. Thus, employee Brian Wagener, employed since April 1986, testified that the job of the crew leader was to walk around and see that production was taking place and that everyone was doing his job. He recounted seeing Kenneth Trask, when Trask was a crew leader, send one crew member home once, when the man was drunk. Employee Robert Jennings, employed since April 1986, testified that all crew leaders had similar duties and except for Schiattone worked along with their crew members. Jennings stated that Schiattone did not weld and remained at the paint line except when he came out to see that crew members were performing their duties. Employee Robert Hopfinger, employed since April 1986, testified that at one time or another Mike Adcock and Paul Van Dorn were crew leaders on the day shift and that they were in charge of different lines and rotated. He stated that whenever he had a problem on the line he would report the problem to either Adcock or Van Dorn, whoever first came along. He added that Schiattone performed the same function as Adcock and Van Dorn and that he considered Schiattone the boss, noting that Schiattone assigned jobs and gave out the paychecks. Employee Dale Seidel, who was hired the last few days in August to work on the second shift, testified that he knew that he had to do what Schiattone told him to do and expected to be dis-

ciplined if he did not follow Schiattone's orders. It was, according to Seidel, Schiattone's job to keep employees from engaging in too much horseplay. When Seidel wished to leave the job and go home early, he would obtain permission to do so from Schiattone. Seidel did not mention anything about Schiattone having to call Cummings before granting permission to Seidel to leave work early. Seidel testified that occasionally he would forget to punch in. When this occurred he would later take his card to Schiattone who would initial it, providing, of course, Seidel could prove that he had been present during the period in question. On those occasions when Seidel reported for work and found his timecard missing, he would report this fact to Schiattone who would then obtain a new timecard for him, fill it out and initial it.

Ed Schiattone was hired in the summer of 1984 as a rank-and-file employee on the first shift, was laid off in January 1985, then rehired in May 1985 as crew leader in the weld shop on the second shift at $5.50 to $6 per hour. After working as crew leader for a period of several months, Schiattone was once again made a rank-and-file employee, at first on the second shift, then later on the first shift. In the spring of 1986, Respondent once again made Schiattone a crew leader in the weld shop and granted him a $1-per-hour wage increase, raising his hourly income to $7.25. By virtue of this wage increase, Schiattone became the highest paid employee on the second shift though he was not the most senior employee.

Schiattone testified that at different times Gary Hall and Rich Rolfe were crew leaders on the second shift over the paint line at the same time that he was crew leader in the weld shop and they, like he, had to keep things running with the same authority as he had. However, neither Hall nor Rolfe were paid as much as Schiattone was paid[8] and neither was required, as was Schiattone, to report in half an hour before the shift, to discuss with Cummings the requirements of production for the second shift.

When Schiattone was appointed second-shift crew leader for the second time, in the spring of 1986, he continued to punch a clock, to be paid by the hour, though somewhat more than other crew leaders, and to receive time-and-a-half for overtime just like any rank-and-file employee. Shortly after Fred May Sr. appointed him crew leader however, May told him that if he were short personnel on his shift and needed someone for the short term, as in the case of a ''hot project,'' if he knew anybody who was out of work, and could do the job required by the vacancy, he had the authority to hire the individual for however long it was necessary, and he would have no problem for having done so.

As far as exercising this authority to hire or effectively recommend hiring, the record indicates that Schiattone did, in fact, exercise such authority. Thus, sometime after his appointment as crew leader, Schiattone gave a welding test to an individual named Gary Cygon as a preliminary step to hiring him. The test was administered during the night shift when no members of management above Schiattone were present. Schiattone advised Cygon that he would notify the people in the office of the results of the test. At that time Fred May happened to call, just to check on the shop, to see how things were going on the shift. Schiattone told May that he had given Cygon the welding test and that he was really good. May said that if Schiattone needed him, to hire Cygon on the spot and put him to work immediately. Schiattone did so.

In August 1986, Schiattone met an individual named Daniel Downing at a social function. Schiattone mentioned that he was looking for same welders. Downing volunteered that he could weld. Schiattone stated that if Downing could, in fact, weld, he would give him a job. A month later the two chanced to meet at the home of a mutual acquaintance. Schiattone, on this occasion, told Downing to come down to the plant and put in an application and he would see what he could do about getting him a job. Subsequently, Downing made application as suggested by Schiattone. Following an interview by Cummings, Downing was told to report to Schiattone at 6 p.m. that evening. Meanwhile, Cummings told Schiattone that Downing and another applicant, Dennis Jacobs, would be reporting to him that evening; that Schiattone was to test the two applicants to see if they could weld, read a ruler, and knew what a square was for; and that if they were reasonably good and if Schiattone wanted them, the Company would hire them. Cummings told Schiattone that if he were satisfied with Downing and Jacobs, he should tell them that they were hired, put them to work then and there, and leave a note on the superintendent's desk advising him as to whether or not Schiattone had hired them.

That evening Schiattone interviewed Downing and Jacobs, appraised them, administered tests to them and hired both men. Downing and Jacobs had initially filed their applications for employment on 8 and 22 September 1986, respectively. Both applicants had been referred for employment by Schiattone. On the evening of 1 October, Schiattone initialed their applications as interviewer, filled out the appraisal section of the application, then signed the applications as approved. Jacobs, who was dressed for and ready to start work, did so immediately that evening. Downing, who was not so prepared, was ordered by Schiattone to report for work the following evening and did so.

In addition to these specific instances when Schiattone referred and recommended applicants for hire, interviewed and appraised applicants for hire, and approved their hire, there is also testimony in the record that Schiattone openly announced on many occasions that he had been given authority to hire and fire employees and specifically named at least one additional employee[9] who he claimed to have hired.

At the same time that Fred May told Schiattone that he had the authority to hire employees, he advised him that he also had the authority to fire people; that if an employee showed up drunk on the job or was in some other way a source of danger to others, Schiattone was to send him home; and that if somebody was just not doing the job, Schiattone should get rid of him.

Schiattone, on occasions, exercised his authority to fire employees. Some of these occasions occurred in connection with allegations of violations of Section 8(a)(1) and (3). These incidents are discussed at length infra. Another incident which is not the subject of any allegation contained in the complaint involved the termination of employee Terry Shawl. According to Shawl, in the fall of 1986, the area

[8] Schiattone accounted for his additional income by pointing out that he had seniority, was a crew leader, and received a night-shift premium. However, at least one other crew leader on the night shift had more seniority and received a smaller hourly wage than Schiattone.

[9] Jim Middleton.

where he lived in his mobile home, received extremely heavy rains which caused the rivers and their tributaries to rise above flood level. The trailer park where his mobile home was located was a lot lower than the surrounding area and was protected by dikes. The people in the area were afraid that the rising rivers would cause the dikes to burst so Shawl had to take off from work to evacuate his trailer and help with some of the flood relief efforts being undertaken.

Shawl was at work when he received a telephone call from the chief of police of Bay City who advised him that they were going to be evacuating the area where his trailer was parked and that he should get home immediately to participate in the evacuation. Shawl advised Schiattone of the call and of the necessity for his having to leave work. In all, he missed 3 days' work while performing such duties in the flood area as sandbagging and evacuation, trying to save the trailer park. His telephone was disconnected and he did not call in to work.

When Shawl returned to work he advised Schiattone that everything was taken care of. Nothing was said his first day back regarding the 3 days of absenteeism. The following day, however, Shawl received a message at his parents' home to the effect that he should call Schiattone back immediately. When he did so Schiattone said, ''Terry, you're either laid off or you're fired. I'm not sure which it is, but we don't need you anymore.'' Schiattone told Shawl that he was missing too much time from work and suggested that he file for unemployment compensation. Shawl did so.

The day after his telephone conversation with Schiattone, Shawl visited the plant to speak with Cummings about what had happened. He asked Cummings whether he was laid off or fired. Cummings asked Shawl what he had been told. Shawl replied that Schiattone had told him that he was either laid off or fired because he was missing too much time from work. Cummings then said, ''Well then, I guess you're fired.'' Shawl then explained to Cummings about the flood situation and that his absence was beyond his control. Cummings then told Shawl that he should go back and talk to Schiattone again and see what he had to say.

After talking to Cummings, Shawl went back to talk to Schiattone. Schiattone told Shawl that he liked Shawl's work but that he was unreliable. He added, however, that he would talk to Cummings and see about having Shawl brought back to the shop.

The day after his discussion with Cummings, a Friday, Shawl was called by Schiattone who told him that it had been decided that he would be given 3 days off as punishment for missing so much time and that he should report for work the following Monday. This he did.

In the area of granting promotions or wage increases, employee Edward Paine testified that in October 1986 Schiattone asked him if he would consider being a crew leader in the weld shop and told him that if he accepted the job, Schiattone could get him a 50-cent-per-hour wage increase. Paine accepted the offer. The following day he received both the promotion and the raise. However, even after being promoted to crew leader, Paine continued to take directions from Schiattone who told him that, as crew leader on the second shift, he was second in command, meaning that Schiattone was first in command.

Employee Roger Kelly testified that in July he mentioned to Schiattone that he was aware that some of the new hires were starting at a higher rate of pay than he, himself, was receiving. He asked Schiattone if he thought that was right. Schiattone agreed with Kelly that it was not fair. Kelly asked Schiattone to talk to Fred May about getting him a raise. Schiattone agreed to do so because he felt that Kelly deserved a raise. The following day Schiattone advised Kelly that he had spoken to May and that May had said that Kelly would get the raise.

A couple of weeks after Schiattone promised Kelly that he would get a raise, Kelly again approached Schiattone, complaining that he had not yet received the promised wage increase. Schiattone reiterated that May had indeed told him that Kelly would get a raise and suggested to Kelly that he speak personally to May about it.

Kelly talked to May as Schiattone had suggested. He asked May if he had gotten his raise and, if so, he had not yet seen it. May said that Kelly would be getting his raise but that he could not give it to him right away because things were not going well at one of the other shops. May commented that Kelly had gone about asking for a wage increase in the right fashion by first asking Schiattone to speak to May about it. May then promised that he would see about getting Kelly the raise. Eventually, Kelly did, in fact, receive the wage increase.

Employee Clifford Trumble testified that in October 1986, Schiattone called him up to Cummings' office in Cummings' absence, and told him that he, Schiattone, was putting Trumble in for a 50-cent-per-hour raise. No one in management other than Schiattone talked with Trumble about his wage increase. As Schiattone promised, Trumble received the 50-cent-per-hour raise.

Schiattone testified that he had no authority to give any employee a wage increase but could ask for and recommend raises for employees. Despite the testimony of employees Paine, Kelly, and Trumble as to how they obtained wage increases through Schiattone, the latter testified that when employees asked for wage increases, he usually sent them directly to Cummings or May to make their requests.

As to Schiattone's participation in the functioning of the weld shop on the second shift, it should be noted that no member of management higher than Schiattone in the chain of command was present in the weld shop during the night shift to give orders or direct operations. Thus, Schiattone was responsible for the filling out of attendance, assignment and production reports for each employee and the maintaining of records of incoming and outgoing invoices. These reports and records were all forwarded by Schiattone to Cummings.

At the start of each shift Schiattone would fill out a roster form which he, personally, had printed for this purpose containing the names, over 20 at relevant times, of the members of his night-shift crew. Next to his own name, which headed the list, were his duties: sup. (supervision), forklift, shipping & receiving and inspection. Next to each name on the roster was a blank which Schiattone filled in with the title of the job which he assigned to each employee on his crew at the beginning of each night shift. Schiattone was personally responsible for each such assignment which he made based upon production requirements passed on to him by Cummings during their half hour of consultation prior to the beginning of each shift. As the shift wore on, Schiattone

would transfer crew members from one job to another,[10] noting on the roster the job to which the employee was being transferred and the time of the reassignment. Each assignment was made on the basis of Schiattone's opinion of the individual crew member's ability, skill and speed. Schiattone also noted employees' absences on the same roster.

Schiattone testified credibly that it was standard practice for him to send his crew members home early before the shift ended. This practice was in accordance with directions given to him by Cummings and May when he was appointed crew leader in the spring of 1986. At that time he was told that if there was not enough work available to keep the whole crew busy, he should send some of his crew home and that he should use his own judgment as to which of the employees should work and which should be sent home. Similarly, Schiattone was authorized to and did, in fact, permit employees to leave their jobs if they became ill at work.

Occasionally, a need for additional welders on the first shift would arise. On these occasions, May or Cummings would tell Schiattone to select a number of good welders for transfer to the first shift. Shiattone would then independently exercise his options and choose from among his crew those welders he wished transferred.

Taking into consideration the testimony of all witnesses[11] on the subject of Shiattone's supervisory authority, I conclude from the above described testimony as well as from the events described infra, that Schiattone, during all relevant times, was, in fact, a supervisor within the meaning of Section 2(11) of the Act and by virtue thereof, an agent of the Respondent. I find, moreover, that his supervisory authority was higher than other crew leaders although the evidence is sufficient to warrant the conclusion that they too, are supervisors within the meaning of Section 2(11) of the Act.

Chronology of Union Activity and Alleged 8(a)(1) and (3) Violations

Toward the end of May 1986[12] the employees of Respondent began to discuss the possibility of obtaining union representation because of their dissatisfaction with working conditions at the plant. Employee Ross Dean contacted the Union by phone and spoke with Richard McInerny, a union organizer. He told McInerny that he felt that the employees needed a union at the plant. McInerny made arrangements with Dean to meet a few days later at a restaurant in Bay City and told him to recruit another employee at the Company to assist him with the organizing campaign.

A few days after his conversation with McInerny, Dean talked with his carpool mate, Bob Jennings about the need for a union and asked him if he would be interested in helping to organize. Jennings agreed. Thereafter, Dean and Jennings met with McInerny at the Bay City Restaurant where McInerny explained the purposes of union representation and the rules to be followed while organizing. He showed them pamphlets and authorization cards and explained the use of the cards. Subsequently, Dean and Jennings talked to other employees about the need for a union.

Later in June there was a second meeting held at the same restaurant. At this meeting, McInerny went over some of the same matters which he had discussed at the earlier meeting. He told Dean and Jennings to listen to employees' complaints and determine how much they supported the Union. After the second meeting with McInerny, both Dean and Jennings spoke to a number of fellow employees about the Union and invited them to attend a meeting at the union hall scheduled for 3 a.m., 9 July. Several of them voiced interest and stated that they would attend. About 7 July, Schiattone, who was already aware of the forthcoming union meeting, asked employee Anthony Fuhrman if he was going to attend the meeting. Fuhrman, who was previously invited by employee Brian Wagener, replied that he planned to attend. During the conversation, Schiattone indicated that he was in favor of the Union and would attend himself. When asked by employee Terry Shawl, about this time, whether he was thinking about signing a union card, Schiattone said that he was. Shawl testified that Schiattone's statement influenced him to go ahead and sign the card himself, since his boss was going to sign one. Other employees also testified as to Schiattone's favorable attitude toward the Union's organizing efforts early in the campaign. Employee Steven Brown testified to a conversation he had with Schiattone in the presence of other employees concerning getting a union into the shop in order to obtain job security. According to Brown, Schiattone was all for it. Employee Brian Wagener testified credibly that he and other employees asked Schiattone whether he was going to attend the forthcoming 9 July union meeting and he said he was.[13]

Shortly before the meeting, probably the day before it was held, Fred May discussed with Schiattone the union activity in which the second-shift employees were engaged. He told Schiattone that he was aware of such activity and knew who was involved. He identified Ross Dean, Bob Hopfinger, Bob Jennings, Ken Trask, and Brian Wagener as union activists and gave Schiattone a list with those names on it. He told Schiattone to keep his eyes and ears open on the second shift to verify his suspicions as to who was involved in the union activity and which of the employees were ''instigating the whole thing.'' He directed Schiattone to add any names to the list that were not already on it if Schiattone found that other employees were involved. He asked Schiattone to leave the corrected list on his desk the following morning.

During the night shift, immediately before the scheduled 9 July union meeting, Jennings mentioned the meeting again to Schiattone and told him that most of the night-shift weld shop employees were going to attend the meeting after work. He asked Schiattone if he wanted to go. Although Schiattone had announced earlier his intention of attending the meeting, he subsequently had the above-described conversation with May. With this discussion fresh in his mind, he replied to Jennings' invitation by telling him that he could not make the meeting but would be interested in knowing the results of the meeting from Jennings when he came in the next day. Both Wagener and Fuhrman had also understood that Schiattone was going to attend the meeting but he told them at the last moment that something had come up; that he had

[10] Schiattone transferred employees not only from one job to another within the welding department but, at times, transferred employees from the welding department to the paint line.

[11] Where the testimony of Cummings and other witnesses is at variance with that of Schiattone, I credit Schiattone.

[12] Hereinafter all dates are in 1986 unless otherwise noted.

[13] Schiattone specifically denied that he was ever invited to attend a union meeting and likewise denied that he ever said he would attend the meeting. I do not credit Schiattone's denials.

to work overtime that evening but would have attended otherwise.

Edward Paine testified to a discussion between employee Steve Brown and Schiattone which took place in the presence of Paine and two other employees. According to Paine, Brown said that a union would be good for a shop like theirs. Schiattone replied that the employees should think twice about organizing a union because if they did so, the Company would close the doors. He explained that when he first started working for Respondent, the employees tried to start a union and the Company threatened to shut the doors if the employees even thought about starting a union.

The 9 July union meeting was attended by Ross Dean, Bob Jennings, Anthony Fuhrman, Steve Brown, Brian Wagener, Bob Hopfinger, and Edward Paine. McInerny informed those in attendance about union membership and passed out pamphlets and authorization cards. Those employees signed and returned authorization cards and took additional cards for later distribution to other employees back at the plant. All the employees who attended were second-shift weld shop employees.

In compliance with May's directions, Schiattone spoke with Jennings the next night and asked him how the meeting went. Jennings replied that seven employees showed up at the meeting; that all signed authorization cards; and that all received additional cards to distribute among other employees. Schiattone then told Jennings that he was going about organizing the wrong way; that there was talk in the shop about the Union and it was getting out of hand. He added that if members of management, up in the main office, found out about the union activity, they would close the doors, move everything out, and go to Birch Run Welding.[14] Jennings offered Schiattone an authorization card which Schiattone refused, saying he would sign one at lunch. According to Jennings, Schiattone never did sign a card.

In further compliance with May's directions and following his discussion with Jennings, Schiattone, on 12 or 13 July, [15] placed the note on May's desk. The note reflected the information which Schiattone obtained from Jennings that night plus the information he had obtained earlier concerning the union sympathies of employees who had talked to him about the Union and about attending the meeting. The note directed to May stated: These are the only people I know about,'' and contained the same names, according to Schiattone, that May had listed earlier. Before returning the list to May, Schiattone removed the names of the Trask brothers because they were now first-shift employees and Schiattone could not tell May anything about their activities as of 12 July and later.

Though prior to the 9 July union meeting Schiattone had indicated that he favored the Union and had, in fact, intended to attend the meeting, after his discussion with May and after the 9 July meeting, his sympathies seemed to the employees to suddenly change. Thus, according to employee Terry Shawl, Schiattone walked up to a group of employees which included Shawl and Dean and told the latter that he was going about it too fast with his organizing activities; that he had talked to the wrong people about the Union; and that he, Schiattone, did not want anything to do with the Union.

About 10 July, according to William Trask, he mentioned to Schiattone, in the presence of employees Kenneth Trask and Roger Kelly, that he had signed an authorization card for the Union. He stated that he wanted union representation so that he could not be fired for the mistakes of others. Schiattone commented that he too was in favor of union representation. He added, however, that if the Union did come in, it would not be good because he did not think that the employees would have jobs.

Despite Schiattone's admonitions, Dean and Jennings continued their organizing efforts. Dean distributed, then collected authorization cards after they were signed by other employees. Jennings, on 10 July, talked to those employees who had not attended the meeting and told them what had occurred. He advised them that if they wanted union representation they would have to sign a card and return it to him. In all, he distributed and had returned to him 11 authorization cards. Roger Kelly was one of those successfully solicited by Jennings that day.

The more effort Jennings put into organizing, the more Schiattone tried to dissuade him. On 10 July Bob Hopfinger heard Schiattone tell Jennings to back off from organizing Bay Metal Cabinet because without getting Saginaw Control[16] organized it would not do any good. Schiattone did not deny making these and other similar statements but testified that when he did so he was just expressing an opinion, one worker to another.

On 11 July, Dean returned to work after being absent the day before. On this day he had his first postmeeting conversation with Schiattone about the Union. This conversation took place in the paint stall in the presence of other employees. Schiattone told Dean that Jennings had ''screwed up'' by talking about the Union to Dusty, a paint line employee. He went on to say that Dean and Jennings did not have a chance of getting the Union into the plant; that the Company would close the doors; and that the employees would be out of a job. Also on or about 11 July, a Friday, Schiattone, still apparently collecting information for May, asked Fuhrman if he had signed any union material. Fuhrman admitted that he had signed an authorization card.

According to Brian Wagener, a few days after the 9 July union meeting, probably about 12 July, Schiattone and he had a conversation about the Union while in the paint booth. Schiattone told Wagener that getting the Union into the plant would do the employees no good because if they succeeded, the Company would just close the doors on them. Wagener asked Schiattone why the Company would do that. Schiattone replied that Baldauf did not need that shop; that he could close it right down and it would not hurt him at

[14] Birch Run Welding and Fabricating Inc. (BRW), like Respondent, is engaged in the manufacture and sale of tool racks. *Birch Run Welding*, 269 NLRB 756 (1984). BRW was incorporated by Baldauf's father in 1977. His parents own half the stock in the company. Baldauf's father and brother, David, have served on BRW's board of directors since 1981. The father is its treasurer. The other half of the stock of BRW is owned by Harold and Roberta Johnson.

[15] The Trasks had worked on the second shift through 11 July. They were transferred to the first shift as of 12 July. Since Schiattone credibly testified that he removed their names from May's list because they were no longer on his shift, he must have returned the corrected list on 12 July or later.

[16] Saginaw Control and Engineering (SCE) is a company located in Saginaw and owned by Baldauf's parents. Baldauf's father is president of the Company. Baldauf and his brother, David, are vice presidents of SCE, as is Fred May Jr., his brother-in-law. About 15 percent of BMC's work is done for SCE. BMC's employees paint products manufactured by SCE though SCE has its own painting operation.

all. He added that the employees at Birch Run had tried to form a union there and had either been laid off or fired because of it.[17]

When Schiattone was examined concerning this conversation between him and Wagener, he testified that certain employees had asked him to see what he could find out about Birch Run. Acting on their request, he talked to Dean Johnson, son of Harold Johnson, part owner and president of Birch Run. Dean Johnson had worked for a time at BMC as an inspector. Upon being asked by Schiattone, Dean Johnson told him that there had been a union organizing effort going on at one time at Birch Run; that it had gone through the aourts; that the union organizing effort had been beaten; and that there was no union at Birch Run. Schiattone testified that he related to the employees what Johnson had said. He testified that he told the employees, apparently including Wagener, that employees at Birch Run had been laid off, not that the entire shift had been laid off.

On Saturday, 12 July, Dean had his second postmeeting conversation with Schiattone about the Union. He asked Schiattone if he was going to sign a union card. Schiattone replied that he was not.

On Sunday, 13 July, Schiattone engaged employee Steve Brown in conversation about the Union. He told him that the Company did not want a union and that they would just as soon close the plant down as have a union. He told Brown that getting a union was a good way of getting himself fired from his job. He added that the employees at BMC had once before tried to get a union but had not succeeded.

The 14 July Layoff

On Monday, 14 July, William and Kenneth Trask punched in at the plant before 6 a.m. The Trasks had transferred from the night shift to the day shift just 2 days before. When they arrived at their work stations, however, they found two new employees standing by their welders. Paul Van Dorn, one of the crew leaders, then came up and told them that they were laid off. William Trask asked why and Van Dorn replied that he did not know, that he did not understand it. He added that Fred May had told him to tell the Trask brothers that they were laid off. The Trasks then noticed May walking by, so they asked him why they were being laid off. May replied that it was due to a lack of work. William Trask asked how the layoff could be due to a lack of work when there was a new hire standing next to his welding machine. May did not answer Trask's question but stated: ''You're no longer employed here. Just get your stuff and leave the building before I call the police.''

The Trask brothers got their gear as instructed, then spoke once again with Van Dorn who told them that there would be a group of employees from the night shift let go that evening. He named Jennings, Dean, Wagener, and Hopfinger. The Trask brothers then left the building, got into their car, and drove around to the front of the building to the front offices in order to demand their pay. The doors, however, were locked and they had to wait an hour until they were opened. Meanwhile, while they were waiting for the doors to be opened, Harold Johnson arrived.[18] Kenneth Trask asked Johnson to find out why he and his brother were being laid off. Johnson agreed to do so, then went inside. When the doors opened, May came to the door. The Trasks asked May what the real reason was that they were being laid off. May replied that their layoff was due to poor productivity, poor workmanship, and poor welds.

Following their conversations with Van Dorn, Johnson and May, the Trasks made phone calls to certain night-shift employees and reported to them that Van Dorn had told them that these night-shift employees were going to be laid off. Thus, Kenneth Trask called Ed Paine and told him that some employees were going to be laid off and thought that Paine would be one of them. Similarly, William Trask called Ross Dean, told him that he, Trask, and other employees had already been laid off and that a few night-shift employees were going to be laid off as well. The Trask brothers, on the morning of 14 July also visited Jennings at his home, woke him up, and told him that they and he no longer had jobs. Jennings asked them why and they replied that they did not know.

At the beginning of the second shift William Trask returned to the plant in order to see if the employees whom Van Dorn had said would be laid off were, in fact, laid off. As each night-shift employee proceeded through the gate Trask informed him of what had oocurred that morning and what was about to happen to each of them. Trask spoke to Jennings, Dean, Paine, Hopfinger, and Wagener about the expected layoff, some for the second time that day.

Despite what he was told by Trask, Paine went directly through the gate, walked into the plant, got his gear, and awaited assignment from Schiattone. Dean and Jennings, who arrived together in Dean's truck, also drove through the gate into the parking lot. As Dean was parking his truck, Schiattone pulled up in his car and shouted, ''Hey, did you guys hear you were laid off?'' Dean and Jennings replied in the negative. Dean parked his truck and he and Jennings entered the plant and got ready for work. Other employees, while still in the parking lot, discussed their layoffs. Shortly thereafter, they also entered the plant and got ready for work. Schiattone came in just behind them.

Schiattone came over to where his crew was awaiting assignment and demanded, ''What are you doing here?'' They replied that they were getting ready for work. Schiattone asked, ''What are you guys trying to do, lose me my job? I told you [that] you were laid off.'' Present at the time were Dean, Wagener, Hopfinger, Jennings, the Trasks, Fuhrman, Brown, Paine, Shawl, and Schiattone. Jennings asked why they were being laid off. Schiattone did not answer his question. Wagener asked, ''What are you talking about?'' Schiattone repeated, ''You're laid off!'' Wagener challenged, ''Nobody from the company told me I was laid off.'' Schiattone replied, ''Well, I'm telling you right now, you're laid off.'' He then picked out Paine, Shawl, Brown, and Kelly and said that everyone other than those four employees were laid off. Those who were laid off again asked why. Schiattone shrugged his shoulders and said that he did not know what was going on. Dean insisted that he wanted to hear the official word; the final say on the matter. Schiattone replied that he was the official word and the final say. He pointed to certain of the employees in turn stating, ''You, you . . . and you are no longer working; you're laid off.''

[17] Cf. *Birch Run Welding*, supra.

[18] As noted earlier, Johnson and his wife along with Baldauf's parents were the owners of BRW.

He added that if they wanted a reason for the layoffs, they should go to the front office.[19]

When Schiattone told the laid-off employees to get out of the plant, they cleaned out their lockers and started to go through the plant to the front office to talk with May or Baldauf as Schiattone had suggested. Schiattone, however, stopped them. He told them that they could not go through the plant; that he would call the police and have them arrested for trespassing. He instructed them to drive around to the front of the plant in their cars.

In accordance with Schiattone's instructions, the laid-off employees drove around to the front office where each of them was called into May's office individually. When Jennings talked with May, he asked him why the seven employees were being laid off. May replied that the reason was lack of production, that they just were not getting the work out. Jennings denied that lack of production was the reason for the layoff. He argued that an inspection of employees' production cards which they filled out every night, would prove that the laid-off employees had, in fact, produced the amount of work required. May then accused Jennings and Dean of being ''instigators of the bull sessions inside the shop'' and of ''just standing around talking all night.'' Jennings testified credibly, and without contradiction, that never before had anyone from management complained to him or disciplined him for lack of productivity.

When Dean was called into May's office, May read to him from a yellow pad. He said that Dean's work was slipping; that production was down; and that he was ''an instigator of bull sessions.'' Dean felt that May's charges against him were ridiculous and apparently said so. May said, ''Well, I got to back the crew leader.''[20] Dean left May's office to wait in the reception room with the other employees.

When Brian Wagener was called into May's office, he too asked why he was being laid off. May again read from notes on a legal pad and stated that the reason was a lack of productivity. May charged that in building his parts, Wagener would build enough to where he would be ahead of everyone else and then would stop building and wait until he actually needed to build more parts. May added that this information was obtained from Schiattone's nightly reports.

When Hopfinger entered May's office and asked why he was being laid off, May replied that Hopfinger was a slow starter and that when the boss left, he would quit working. Hopfinger then asked May if he could speak with Baldauf's father. He was given permission to do so and then left May's office. After leaving May's office, Hopfinger, went out into the reception area where in the presence of other laid-off employees, he spoke with Baldauf's father about his layoff. The elder Baldauf said that he would check into it. Dean and the other employees also spoke briefly to Baldauf's father about their layoffs. He, however, like May, only said that he had to back the crew leader.[21] Although Fuhrman accompanied the other laid-off employees to the front of the plant to speak with May, he was not invited into May's office. When May came out of his office, however, Fuhrman asked him why he had been laid off. May merely replied that it was for lack of productivity.

Schiattone testified that some of the employees laid off on 14 July, Dean, Jennings, Hopfinger, and Wagener, were laid off because they were just standing around and not working. He stated that when he reported to May that certain employees were just standing around, May requested Schiattone to supply him with a list of these employees. When Schiattone did so, May fired them.

Schiattone testified that he knew that the named employees were just loafing because there was always work to be done in the weld shop and employees could not legitimately complain that there was nothing to do. He said that he wanted those employees who were laid off on 14 July taken off his shift, not so much to be laid off, and that this was his recommendation. When asked by General Counsel if the list of employees standing around was a separate list from the list of employees involved with the Union, both of which Schiattone had supplied to May, Schiattone testified that they were separate lists.

Shortly after the 14 July layoff, May and Schiattone were engaged in a conversation concerning personnel. May asked Schiattone what had happened to Fuhrman and why he had not been coming to work. Schiattone replied that he did not know. May stated that he had heard that Fuhrman had just walked out with the rest of the laid-off employees, apparently believing that he was being laid off along with the others. May instructed Schiattone to call Fuhrman up and find out if he still wanted to work and, if so, to call him back. He cautioned Schiattone, however, to first find out if Fuhrman had signed a union card. He instructed Schiattone to call Fuhrman back to work if he had not signed a card but not to call him back if he had signed a card.

On Thursday, 17 July, Schiattone contacted Fuhrman as ordered. He asked him if he wanted to return to work and Fuhrman replied that he did. Schiattone told Fuhrman that his layoff had been a mistake. He then asked him if he had signed a union card. When Fuhrman admitted that he had, Schiattone told him to return to work but warned him that if anyone in the front office should ask, he should deny that he had signed a card. Schiattone explained that he had already told May and the other front office people that Fuhrman had not done so. When Fuhrman returned to work, he worked the second shift.

Post 14 July Activities and Incidents

Following the 14 July layoff the Respondent began to hire replacements. Over the next several months, two to four new employees were hired each week to work the second shift both in the weld shop and on the paint line. The night-shift employees worked overtime. According to Shawl, he worked 5 p.m. to 3 a.m., Monday through Friday and 2:30 p.m. to 11 p.m. Saturdays.

On 24 July the Union filed the charge in Case 7–CA–26062 and the following day the Respondent was served with a copy. The charge alleged the discriminatory discharge of the seven employees on 14 July in retaliation for their organizing activities on behalf of the Union. Despite the layoff on 14 July, union activity continued. Union organizational meetings were held in late July and thereafter. Laid off employees and working employees attended these meetings. Management was aware of both the meetings and the contin-

[19] Schiattone's role in the 14 July layoff is additional, if not conclusive, evidence of his supervisory status.

[20] This statement by May supports the earlier finding that Shiattone was a supervisor during relevant periods.

[21] This statment by Baldauf's father supports the earler finding that Schiattone was a supervisor in July 1986.

ued organizational activities among the employees on the night shift. Schiattone felt obliged to take Kelly aside at one point and warn him that May had found out about the union organizational drive; that the employees had better be careful because management was not too happy about it; and that management had said that the Company would move the work out to Birch Run Welding if the union organizational drive went too far.

In August, Schiattone had a second discussion about the Union with Kelly. He told Kelly that the new employees should stay away from union activities because if they did not and May found out about it, they would be out the door.[22]

On 5 September complaint issued in Case 7–CA–26062. In mid-September, a short while after a new employee, Thomas Wilson, was hired, Schiattone engaged him in conversation. During the discussion, Schiattone mentioned, in confidence, that the Company had had some trouble and had laid off seven employees for trying to start a union but was soon going to hire them back.[23] The same day Respondent sent letters out to the laid-off employees directing them to report back to work on Monday, 8 September at 8 a.m.[24]

Of the six employees still on layoff status as of the date the recall letter was sent, only Dean, Hopfinger, and K. Trask made immediate response and accepted Respondent's offer, returning on 8 September or shortly thereafter. These employees were, at the time, placed on the first shift. Brian Wagener, who was also sent a recall letter, was out of town working for another employer when his letter was delivered to his parents' home where he had been living while working for Respondent prior to his discharge. When Wagener visited his parents, sometime between 15 and 18 September, he finally received and read the letter requiring him to report for work 8 September, a week to 10 days earlier. The very next day, after reading the recall letter, Wagener visited the plant, showed the letter to Cummings and explained that he had been out of town when the letter was delivered. He told Cummings that he would like to return to work for Respondent. Cummings replied that it was too late; that 3 days after the letter had been sent, Cummings had to hire somebody to fill Wagener's position. Though Wagener also talked to May about reinstatement, this too was to no avail.

The record reveals that both before and after Wagener's request for reinstatement as a welder, Respondent received applications for welders' jobs. Applicants were hired as welders 2 to 3 weeks after Wagener applied for reinstatement despite the fact that they had no experience working for Respondent.

Though the three union adherents who were recalled during the second week in September were immediately transferred to the first shift, organizing activity nevertheless continued thereafter on the second shift. Additional union meetings were held and employees were approached to sign authorization cards and did so. Nevertheless, this activity was not blatantly open and employees did not express their prounion sentiments overtly until early October.

The Resurgence of Union Activity and Reduction of Dean's Wages

On the morning of 7 October, McInerny and another union agent showed up in Respondent's parking lot and distributed to employees envelopes which contained authorization cards as well as union literature, buttons, pocket protectors, and pencils all bearing prounion slogans or markings. The prounion employees entering the plant accepted these symbols of unionism for their own use and for further distribution. Dean immediately pinned union buttons to his coat and vest and applied union stickers to the sides of his welding hood. He carried pencils bearing the union logo in his pocket. He distributed among employees in the plant buttons, stickers and pocket protectors bearing Steelworkers' slogans. The items distributed that morning were worn that day and thereafter by the night-shift employees favoring representation.

That afternoon, Paul Van Dorn, Dean's crew leader, told him that Cummings wanted to see him in his office. When Dean and Van Dorn arrived in the office, Cummings told Dean that he would be receiving a wage reduction, explaining that since Dean was no longer performing the duties of a crew leader[25] and was now on the day shift, the Company was going to have to reduce his wages by 50 cents per hour. He added that Dean was making too much money and it was not fair to the other employees. Dean objected to the wage reduction and told Cummings that when he was removed as crew leader the previous May, after serving only 4 days in that capacity, Fred May agreed that Dean should be allowed to keep the extra money he had been earning because he ''was worth it.'' Dean complained further that it seemed unfair to take a wage reduction after so many months. Cummings persisted, stating that he had just found out about it and it was not right. He said that the other employees were complaining about Dean's wages, and that he had no choice. He also argued that, by rights, Dean should be cut $1 per hour but that the Company was only going to cut his wages 50 cents per hour. He stated that other employees who had been working longer for the Company than Dean were making only $5 per hour. Dean's wages were reduced.

Cummings testified that for a time he was unaware that Dean continued to receive a nightshift crew leader's wages despite the fact that he had been transferred to the dayshift as a rank-and-file welder. Then, according to Cummings, an employee, whose identity he could not recall, brought the fact to his attention. When told about Dean's higher wage rate, Cummings checked the personnel file and found that Dean was, indeed, still receiving crew leader's wages. He decided that this was an error that had to be corrected. According to Cummings, that is when he called Dean to his office and told him that his wages were going to be reduced and the reasons for the reduction. With regard to Dean's claim that May had agreed the previous spring, when Dean was re-

[22] No violations are alleged to have taken place in August.

[23] The implication that Wilson would meet the same fate, if he were to engage in union activity, was not alleged in the complaint as an independent violation of Sec. 8(a)(1).

[24] The letters were not offers of immediate and full reinstatement to their former jobs inasmuch as most of the laid-off employees had been working the night shift but were recalled to the day shift.

[25] Dean had been hired on 12 May as a crew leader. After only 4 days he was demoted to welder. When Dean asked May why he was no longer a crew leader, May told him that he was too nice a guy to be crew leader. Dean objected, ''How much do you expect out of a person in 4 days? I don't even know everybody's name!'' During this conversation, May agreed to let Dean continue to earn crew leader's wages.

moved as crew leader, that he should keep the extra 50 cents per hour, Cummings denied that May would have said this. Fred May, though called as a witness for Respondent, inexplicably was never examined with regard to this matter.

The appearance of the union organizer in the parking lot, and his distribution of union pins, buttons, pocket protectors, pencils, and stickers to Respondent's employees reflected, in the eyes of management, a resurgence in union activity and renewed interest of the employees in the Union. Schiattone and Cummings discussed the situation. Schiattone complained that he felt that he was ''kind of stuck in the middle'' between the employees and management. He asked Cummings what was going to happen. Cummings replied that if the Union came in, probably the Company would just close down and lay everybody off. This conversation, and perhaps others, prompted Schiattone to make certain comments about the Union to the employees.

Employee Thomas Wilson recounted an incident wherein he and other employees were at the timeclock getting ready to check out when Schiattone, obviously aware of the renewed interest in the Union and, having had the discussion with Cummings described above stated: ''I wish you guys would hurry up and get the Union in so I can get laid off because we're all going to get laid off if we get the Union in, and then I can draw unemployment.'' This statement was made in the presence of almost the entire shift.

Terry Shawl testified that it was about this time[26] that he overheard a conversation between Ted Brown, a truckdriver employee of BMC, and Schiattone. He stated that he heard Brown ask Schiattone what he thought would happen if the Union got in, and that Schiattone replied that the Company would simply close the doors; shut the place down; sell the whole works to Harold Johnson (part owner of BRW); and reopen it as Bay Fabrication. He heard Schiattone conclude his statement by saying, ''That will be the end of it.''

In late September, according to employee Clifford Trumble, Trumble and Schiattone had a conversation in the lunchroom of the plant. During the conversation Schiattone told Trumble that Respondent's employees had tried before to get a union in the shop, but that the Company just laid the shift off and hired new people.[27] He added that it would be useless for the employees to try to get a union in the plant because the Company would do the same thing again; it would just lay the shift off and hire new people. Trumble testified that Schiattone's statements were made in the presence of other employees.

Dale Hawes, an employee hired by Respondent 29 September, testified that he heard Schiattone state three or four times, when asked what he thought about the Union coming in, that employees might as well forget it because if the Union came in, management would close the shop and more than likely sell it for a dollar, change names along the line, and reopen it with a new crew. Hawes also testified that Schiattone added that those present would all be out of a job. He stated that Schiattone would make these statements usually at the end of the shift when the employees gathered around the clock to punch out. Schiattone testified that he did, in fact, tell employees on the second shift that if the Union got in, he expected the Company to close up and if it closed, it would probably reopen under another name. Schiattone stated that when he made such statements he was just voicing his own opinion.

It was sometime during this period that Shawl returned from his 3-day layoff described above in connection with Schiattone's supervisory status. When he returned, Shawl, like certain other employees, wore a union button and pocket protector for the first time and began to distribute to fellow employees these and similar items bearing the union insignia. As he entered the plant on his first day back he passed Baldauf who pointed to Shawl's union button and asked him what it was. Shawl replied that it was decoration. Baldauf then asked, ''What is it supposed to mean?'' Shawl replied, ''Nothing,'' adding that he had to punch in before he was late.[28]

Later that day or shortly thereafter, while Shawl and Schiattone were alone in the breakroom, Schiattone pointed to the union button on Shawl's lapel and commented: ''Yes, a union would be a good idea, but I'd hate to see them close the shop.''

The First Suspension of Dean

On 9 October, just 2 days after the resurgence of union activity, Dean was at his work station and happened to run out of carbon dioxide. He proceeded to the storage area to get a new cylinder of carbon dioxide in order to continue welding. He picked up a hand truck, loaded a new cylinder of carbon dioxide on it and brought it back to his work station. He unhooked the old cylinder from the welder, and hooked up the new one. While he was in the process of making the exchange, someone took the hand truck away. Dean awaited the return of the hand truck but no one brought it back. Finally, he wheeled the old cylinder up against an I-beam, left it there and went back to work right next to the cylinder.

According to Dean, 2 weeks prior to the 9 October incident, discussed infra, Respondent had issued a memorandum concerning the proper storage of carbon dioxide cylinders. The memorandum stated that employees failing to properly store carbon dioxide cylinders would be disciplined: for the first offense there would be a warning; for the second offense there would be suspension; for the third offense there would be discharge. According to Paul Van Dorn, Dean's supervisor at the time, there were rules posted concerning the proper handling of carbon dioxide cylinders and these rules required that every carbon dioxide tank be stored behind a chain in order to prevent it from falling and possibly causing great harm to those around. Van Dorn testified that the memorandum which issued on the subject called for a 3-day suspension for the first offense.

On 9 October, Van Dorn walked by and noticed Dean's cylinder nestled against the I-beam and asked him if the cylinder was his. Dean admitted that it was. Van Dorn then asked why it was not secured behind a chain. Dean replied that he could not find a hand truck to transfer the cylinder to the storage area. Van Dorn commented that Dean did not need a hand truck to transport the cylinder; that he could simply wheel the cylinder to the storage area, some 75 feet away, where it could be stored.

[26] Shawl was unable to pinpoint the date or even the month of this conversation. However, it is likely that it followed the resurgence of union activity on the part of the employees on 7 October.

[27] Most probably Schiattone was referring to the 14 July layoff.

[28] Baldauf denied that this conversation took place. I credit Shawl.

Van Dorn reported the incident to Cummings and recommended that Dean be disciplined. Cummings told Van Dorn to give Dean a 3-day suspension which he did.[29] Van Dorn testified that copies of the memorandum concerning storage of cylinders were still available at the time of the hearing and that Cummings should be in possession of copies. General Counsel asked counsel for Respondent to produce copies of the memorandum and counsel for Respondent promised to ''look into it.'' The memorandum was not produced.

The No-Solicitation, No-Distribution Rule

In early October Respondent distributed a personnel manual which contained the following prohibitions on page 6:[30]

> 4. Soliciting or collecting contributions for any purpose on company premises without management permission.
>
> . . . .
>
> 11. Distributing written or printed matter of any description on company premises without written management permission.

The Second Suspension of Dean

Toward the end of October, demands from Respondent's customers increased and Respondent fell behind in filling orders. For these reasons Respondent went on a 10-hour a day schedule. Thereafter, the Respondent posted a notice stating that employees would have to work Saturdays and possibly Sundays. Some employees did not appreciate the new schedule and members of management had to talk with them about it. Dean, according to Cummings, did not want to go along with the new program. Cummings told Dean that he expected him to work weekends like everybody else. Despite the discussion between the two, Dean did not show up for work the following weekend. Cummings again spoke to Dean and told him that if the same thing happened the following weekend, 25 and 26 October, they would have a problem. Dean replied, ''Well, then I guess we have a problem.''

Dean testified briefly that sometime during the week of 20 October, Van Dorn asked a group of employees including Dean whether they preferred to work that day or on the forthcoming weekend, 25 and 26 October. Having been given this option of workdays, Dean chose, with Van Dorn's approval, to work that day and to take the weekend off.[31]

When Dean finally reported for work on Monday, 27 October, he was told by Cummings that he was being given time off for not working over the weekend. Dean asked, ''Was I the only person that didn't work this weekend?'' Cummings replied, ''No, but I am going to deal with them later.''[32] Dean's suspension was for 2 days, Tuesday and Wednesday, 28 and 29 October.

On the subject of weekend work Van Dorn, Dean's supervisor, testified that there was a requirement about this time that employees work weekends and that they did so without objecting. None of the employees asked to be excused from the program. Van Dorn admitted, however, that often employees simply would not show up, in which case they were supposed to call in. If they had a special reason for not showing up for work, such as a wedding to attend, they would be excused, otherwise, they would not. Van Dorn did not testify specifically as to whether or not he had given Dean an option to work an earlier weekday or on the weekend of 25 and 26 October.

The Third Suspension of Dean

During the last week in October, after Dean was suspended allegedly for failure to work the previous weekend, he received a number of welding flash burns.[33] On Monday and Thursday, 27 and 30 October, Dean received flash burns which were, acording to Dean, irritating but not intolerable. On Friday, 31 October, he received a more serious flash burn. He told both crew leaders, Adcock and Van Dorn, about the last burn; sought permission to obtain treatment; and advised them that he did not know if he would be in to work the following day.

That day Dean sought treatment at Mid Express, a clinic in nearby Frankenmuth, where he received immediate medication, a fluoroscopic examination, and a prescription. He was told to return for further examination the following day, Saturday, 1 November. Before leaving the clinic, Dean obtained a doctor's certificate from the receptionist, which identified his injury as a second degree burn and which bore the notation:

> Return tomorrow: Use eye drops as directed. Was treated for flash burns of both eyes—Not to return to work until rechecked here.

Dean returned to the clinic for reexamination the following day.

On Monday, 3 November, Dean returned to work. Nothing happened at first, but later in the day Van Dorn told Dean that Cummings wanted to talk to him. Dean asked why and Van Dorn said, ''Well, he's lookin' for a reason to can ya.'' Dean showed Van Dorn his medication and the above-described doctor's certificate and they both went to see Cummings.

When the three met in Cummings' office, Cummings began, ''Well, I hear you got flash burns,'' then questioned, ''Is this going to be an every weekend thing?'' Dean replied, ''Well, what are you trying to be, same kind of smart ass?''

---

[29] Dean testified that employees Rob Adcock and Mike Phelps had stored cylinders improperly after issuance of the memorandum and before Dean had been suspended but only received warnings. Neither Adcock nor Phelps was called to testify in substantiation of or contradiction to Dean's claim.

[30] Distribution of the personnel manual including the cited language is admitted in Respondent's answer dated 19 March 1987. With regard to par. 8(j) of the complaint Respondent, in its answer, contends that the Regional Director, on 31 December, dismissed this aspect of the case. There is no evidence in the record to support this contention.

[31] The question of whether or not Van Dorn had given Dean the option of working on the weekend of 25 October was neither sufficiently pursued nor totally clarified by either counsel during their examination of Dean and Van Dorn.

[32] The record is incomplete as to whether Cummings did, in fact, deal with the other employees later or whether his treatment of Dean was disparate. Similarly, the record is incomplete as to whether Dean tried to explain to Cummings that Van Dorn had given him the option of working 1 day earlier in the week or working the following weekend. If Dean failed to defend his absence on 25 and 26 October on these grounds, there is no explanation for this failure.

[33] A welding flash burn is an injury to the eye which occurs, most often, when the eye is left unprotected in the presence of a welding arc. If the eye is unprotected by safety glasses or a welder's hood, the eye can be temporarily or permanently damaged.

Cummings said, ''No, we just got to have people we can count on.'' Cummings then asked Dean for his doctor's certificate which Dean then gave him. After a brief discussion about whether the Company would pay the medical bill, Dean went back to work, there being no discussion about discipline at this time. At quitting time, however, Baldauf came over to Dean and told him that Cummings would like to speak to him. When Dean arrived at Cummings' office, Cummings said ''We've got to let you go. You're on suspension pending discharge.'' Dean, annoyed, walked out. His suspension was for 3 days—4, 5, and 6 November.

Discharge of Curtis Sauvage

Meanwhile, in late October, Respondent laid off the entire second-shift paint line as a disciplinary measure in connection with the finding of a beer can in the work area. Curtis Sauvage testified that initially he did not wear any union insignia while at work but that after the disciplinary layoff and upon his return to work, he wore items with union logos all the time. He testified to wearing an eyeglass holder marked with a Steelworkers logo or slogan and a button with the legend, ''Go Steelworkers.'' Soon after his return, Sauvage was working in the weld shop when he was approached by Baldauf who pointed to the eyeglass holder and asked him where had he gotten it. Sauvage replied that he had found it lying around. Baldauf told Sauvage that he should not be wearing it. Sauvage asked Baldauf if the Company had a dress code to which Baldauf replied in the negative. Sauvage then said that he would wear the item under discussion until the Company did have a dress code.[34]

Sauvage testified concerning another incident of relevance. This occurred in November. According to Sauvage, 1 night while he was painting cabinets on the line, May came in and in his presence and that of Rolfe, stated that the Union was a bad thing and that if the employees voted for the Union, Harold[35] would close the shop and everybody would be out of a job. Sauvage also testified that about 3 nights after May had told him that Harold would close the shop if the employees voted for the Union, May was called to the plant because an air compressor had broken down. After Sauvage and May discussed the problem with the air compressor, May again brought up the subject of the Union. Once again he told Sauvage that the Union coming in would be bad. He pointed to the union badge which Sauvage was wearing on his pocket and told him that he should not be wearing it. He said that the employees should not be going with the Union because the Union was going to cost everybody his job.

On 5 November the Union filed the charge in Case 7–CA–26359 which alleged violations of Section 8(a)(1), (3), and (4) and included among various other allegations, the discriminatory reduction of Dean's wages which had taken place several weeks earlier. It also alleged the discriminatory suspension/termination of several employees including Sauvage.[36] The charge did not, of course, include any allegation concerning the discharge of Dean who was still on suspension pending discharge. A copy of this charge was served on Respondent on 6 November.[37] About this time, presumably as a result of the filing of the charge, Respondent sought and obtained the services of Thomas A. Basil, management representative. Although the hiring of Basil appears to have occurred a few months after May told Schiattone that he knew who the union organizers were and identified them to Schiattone, Basil, nevertheless, asked Schiattone to identify for him, the employees who were wearing insignia, badges and buttons, in order, he told Schiattone, to show that there was no discrimination between prounion and antiunion employees—that all were being treated the same. He asked Schiattone for a list of union button wearers and Schiattone supplied him with the requested list.

When Dean returned to work on 7 November to get his check, he asked to speak to Cummings and did so in the reception area. He asked Cummings what his employment status was. Cummings replied that Dean should report for work the following day, Saturday, 8 November. He said nothing about any pending discharge and Dean reported as instructed.

On 12 November the Union sent a demand letter to Respondent claiming majority status and requesting recognition and negotiations. On 17 November the Union filed the petition in Case 7–RC–18231, a copy of which was received by Respondent on 19 November.

Sometime in November, before Thanksgiving, according to employee Daniel Downing, he and Schiattone were taking a break near the Ford bumper racks upon which they were working. Schiattone commented to Downing that the racks had come from Birch Run Welding and if they [Respondent's management] wanted to do so, they could take the job back there.

Employee Steve Brown recounted a conversation between himself and Schiattone which also took place in November. Brown, at the time was wearing a button bearing the legend, ''Join United Steelworkers.'' Schiattone commented that wearing the button was a good way of losing his job.[38]

It was apparently sometime in November when another incident occurred concerning which employee Richard Rolfe testified. Acoording to Rolfe he, Fred May and certain other employees were present at the packing table where May was making job assignments as the shifts were changing and they were getting the equipment ready to begin painting. May, at some point, made reference to ''the morons in the weld shop signing union cards,'' adding that ''Harold [Baldauf] would close the place down if the union got in.''[39]

Between 17 November, when the petition was filed, and 1 December, when Sauvage was eventually discharged, Sauvage was working on the paint line when Baldauf asked him how he would vote on whether the Union should be allowed to come into the plant. Sauvage replied that he had not had a raise in a year and asked rhetorically, ''How do you think I would vote?''[40]

According to Sauvage, Saturdays were workdays in November and if an employee wanted Saturday off, he would have to request it from his crew leader in writing, by the pre-

[34] Baldauf denied that this discussion ever took place. I credit Sauvage.

[35] Baldauf's father.

[36] This charge apparently bore reference to the disciplinary suspension based on the beer can incident.

[37] The charge was apparently drawn up by McInerny on 29 October and mailed to the Regional Office on or about that date. It was not received, however, until 5 November at which time it was date stamped and filed.

[38] This incident was not separately alleged as a violation.

[39] May specifically denied making these statements. I do not credit his denial.

[40] Baldauf denied asking Sauvage this question. I credit Sauvage.

vious Wednesday. Sauvage worked for crew leader Gary Hall over a period of time during which he asked permission to take Saturdays off on several different occasions. Once Hall came back and told Sauvage that his request had been approved; twice May came out and told Sauvage that his request had been denied; and the other time, nothing was said, so Sauvage took the day off and no action was taken against him.

On Tuesday, 25 November, Sauvage was working, not for Hall, but for Crew Leader Richard Rolfe. That day he left a note on Rolfe's desk requesting permission to take off Saturday, 29 November. Sauvage received no reply to his request and therefore assumed, as in the past, that his request had been approved. Nevertheless, to be sure, the following day Sauvage asked Rolfe if he had turned in his request for Saturday off. Rolfe replied that he had given Sauvage's request to Cummings and that he had put it in his pocket. Sauvage's request would prove significant several days later when he was fired.

On the evening of Friday and Saturday, 28 and 29 November, Sauvage came to the plant to work as usual on the paint line. He was assigned to loading and boxing. The items to be painted were cabinets with louvers, trays, and doors which were to be painted with Duratex, a silicone based paint which is difficult to apply. Several cabinets had already been done by the day shift and were on the line when Sauvage arrived at work.

When Rolfe, who was crew leader on the second-shift paint line, inspected the cabinets which had been done by the day shift, he found them unacceptable. He ordered the first six or seven of the cabinets removed from the line, resanded, repainted, and reloaded onto the line. Of the next seven cabinets which came down the line, those done by the second shift, five had to be sanded and repainted. Additional cabinets, louvers, and doors had to be taken off the line, resanded, and repainted. Sauvage sanded the cabinets which Rolfe decided had not been done properly, while two new employees painted parts of the cabinets which were easier to paint. One of the two new employees was responsible for mixing the paint for repainting the cabinets.

There was a great deal of trouble with the paint that night and finally when they ran out of Duratex of a particular lot number, it was decided not to start painting with a new batch of a different lot because of the probable difference in shade. Rolfe decided to use plain black paint to paint the cabinets for the remainder of the shift.

When management and the first shift arrived on Saturday morning, they found 12 cabinets left from the night shift which had to be resanded and repainted because the finish was so poor. Acoording to Baldauf, when the day shift arrived on Saturday morning, 29 November, the cabinets were found piled in a heap on the floor, unfinished, and half sanded. Baldauf testified that he investigated and as a result Sauvage was discharged. He explained that Sauvage was the head painter on the night shift and, as such, should have made sure that the painting was done correctly. Instead, according to Baldauf, Sauvage permitted the painting to continue throughout the night without stopping to determine what was going wrong. He complained that it should have been obvious that the paint job on the cabinets was atrocious but that the paint line employees just kept painting. This, Baldauf testified, was just negligence on Sauvage's part.

On Monday, 1 December, someone at the plant called Sauvage and told him to report an hour early. When he did so, Cummings told him that he was going to have to let him go because what happened the previous Friday night was a total fiasco and that it had taken 3 hours Saturday morning to straighten out the mess. Sauvage asked what mess Cummings was talking about and Cummings replied that he was talking about the Duratex mess. Sauvage objected that there had been something wrong with the paint but that, at any rate, he had been loading the line, not painting. He added that there had not been much of a mess; that the cabinets on the floor had been sanded and just had to be repainted. Cummings complained that the Company could not afford that; that there was too much down time; and that no parts had been done on that shift. Sauvage then asked what all of that had to do with him. Cummings replied, ''Everything, you're the head painter. Sauvage responded truthfully that he had never been informed that he was head painter, thus denying responsibility for the problem under discussion.

At this point, Cummings changed the subject and complained that Sauvage had not reported for work Saturday night, 29 November. Sauvage replied that Cummings must have gotten his note because he had given it to Rolfe; that he had placed it on Rolfe's desk the previous Tuesday. Cummings denied ever getting Sauvage's note requesting Saturday off. Sauvage then asked Cummings if he had gotten his (Sauvage's) note about the ribbon burners. Cummings replied that he had. Sauvage then accused Cummings of lying, stating that his note concerning the ribbon burners and his request for Saturday off were both on the same piece of paper. Cummings called Sauvage a lousy worker. The conversation ended and Sauvage left.

According to Rolfe, shortly after Sauvage's discharge, he had a discussion with Baldauf during which he asked why Sauvage had been let go.[41] To this question Baldauf recounted how the painters had had trouble with the Duratex paint and had left the work unfinished. He said that he was upset and held Sauvage responsible as crew leader. Rolfe thereupon reminded Baldauf that he, Rolfe, not Sauvage, had been the crew leader the night of the Duratex problem and that he had been assigned that responsibility by May. Baldauf, unfazed by this revelation stated that they did not have to worry about it anymore because Sauvage was gone. At that point Arnold came up to where Baldauf and Rolfe were standing and joined in the conversation. Then as Rolfe started to walk away, he heard Baldauf utter the words, ''teach them for fucking with the Union.''[42] Later, Rolfe asked Arnold what Baldauf had said but Arnold just laughed and walked away.

Cummings testified that he released Sauvage because he was not doing his job; the quality and quantity of his work were unsatisfactory; his attendance was bad; his attitude was bad, he did not seem to want to take direction; and he had his own idea of what he should do and when he should do it. According to Cummings, he reached these conclusions about Sauvage's work after observing him working on both shifts between August and his termination, and after con-

[41] Rolfe testified that this conversation took place the week of 8–12 December (Tr. 220). Elsewhere he testified that it occurred the day of Sauvage's discharge, 1 December (Tr. 240). Despite the discrepancy as to the date, Rolfe's testimony is otherwise credited.

[42] Baldauf denied making this statement. I do not credit Baldauf's denial.

sultation with crew leaders Gary Cuttitta, Matthew Arnold, Gary Hall, and Edward Schiattone.

The Layoff of the Night Shift

On 3 December Respondent laid off six second-shift employees.[43] One of these, Terry Shawl, called the plant on 6 consecutive days asking about returning to work but was told that there was no work. When Shawl visited the plant and talked to Cummings, he was told again that there was no work. On 5 and 8 December, two more second-shift employees were laid off.[44]

Meanwhile, on 4 and 8 December the parties signed a Stipulated Election Agreement which was approved by the Regional Director for the Seventh Region on 9 December. The eligibility date provided therein was for the weekly period ending 30 November. The election was scheduled for 13 January 1987.

During the second shift, Thursday and Friday, 11 and 12 December, Rolfe and Schiattone had a conversation that took place at the end of the paint line where they were unloading parts. Schiattone told Rolfe that he had just gotten back from talking with Cummings and that Cummings had told him that the Company was moving the end frames, jigs and equipment out to Birch Run Welding and Fabricating. The end frames were the parts that the night-shift employees were working on at the time and the jigs were the special pieces of equipment that held the end frames in place while the employees welded and worked on them.

Later in the day on Friday, 12 December, Cummings called Rolfe and told him there was a layoff because there was no work. At this time, according to the record, Rolfe and other employees had been working 50 hours per week. The other employees on the night shift also received word of the layoffs on 12 December and were also told that there was a lack of work or simply that they were no longer needed. The effective date of layoff for these second shift employees[45] was 15 December. In addition, Robert Hopfinger, a first-shift employee and one of the seven original prounion employees terminated on 14 July, was let go also.

Cummings testified that he had played a part in the decision concerning which employees would be laid off. He stated that the Company does not utilize seniority when determining layoffs and did not do so with regard to the December layoffs. In fact, according to Cummings, ''I don't think [seniority] would have anything to do with it. It was the second shift that we got rid of.'' There were a number of first-shift employees who were less senior than those on the second shift and who were kept while the more senior second-shift employees were laid off. Cummings even admitted that on 15 December, Respondent hired one new employee.

Baldauf testified that it was around 15 or 17 December when management decided, ''Well, lets get rid of these jigs and parts if we can't complete the job.'' BRW took over production of the GM frames at that time. The decision to have the frames produced at BRW rather than at BMC was made jointly, according to Baldauf, by May, Cummings, and Baldauf, with no input from anyone at Birch Run. Baldauf stated that many of the loads of GM end frames had been rejected by General Motors and since GM was BRW's customer, it made Harold Johnson of BRW unhappy that GM was dissatisfied with the end frames produced by BMC.

Cummings testified that the GM end frames job had been taken out of BMC at his own recommendation because BMC was not making any money and that, at the time of the hearing, the job was being done at BRW. In order to enable BRW to produce the end frames, BMC sent the necessary jigs and parts to BRW in mid-December. Cummings testified that it was the very day after May told Cummings that the Company had decided to go along with his recommendation and get rid of the GM end frames job, that the Company started loading the fixtures for transfer to BRW.

Cummings explained that BMC could not produce the GM end frames in good quality and quantity so it was decided to get rid of the job. According to Cummings, GM rejected BMC's last two loads of frames and the paperwork which accompanied the rejected loads stated that GM would not accept any more frames if the quality did not improve. Respondent offered no such paperwork into evidence.

A few days after the 15 December layoff, employee Downing visited the plant and asked Schiattone how much longer the employees would be on layoff. Schiattone, who was still working on second shift, replied that he did not think that anyone was coming back and that he, himself, might get laid off. On 16 December, Respondent, by letter, advised its laid-off employees that their layoff should be considered permanent and suggested that they seek employment elsewhere.

Thereafter, about 27 December, employee Ed Paine visited the plant and asked if he could return to work by bumping into the first shift. Cummings refused his request. While visiting the plant, Paine saw employees working on the second shift who had less seniority than he had. On 31 December, Respondent sent a letter to the Regional Office listing a number of employees whom it contended were permanently laid off and therefore ineligible to vote.

On 13 January 1987, the representation election was conducted. The tally of ballots indicates that 9 votes were cast for the Union and 25 votes were cast against the Union. There were 21 challenged ballots which, of course, were determinative of the results.

On 20 January, the Union filed the charge in Case 7–CA–26573[46] and on the same date filed objections to the election. Both the charge and the objections allege that Respondent permanently laid off its second-shift employees in retaliation for their protected organizing activities; to chill their support for the Union; and to prevent the Union's supporters from voting in the 13 January election. As noted supra, the second amended consolidated complaint and report on objections and determinative challenged ballots issued 9 March 1987.

[43] Steve Brown, Dan Downing, Kevin Rosebush, Dale Hawes, Darryl McMullen and Terry Shawl.

[44] Jerry McQuarter and Dan Downing respectively.

[45] Rick Campbell, Norman Dean, Pat Draves, Steven Estes, Ed Paine, Dan Potter, Dennis Rahn, Terry Ratajczak, Richard Rolfe, Richard Roque, Dennis Jacobs, Kenneth Jolin Jr., Roger Kelly, James Tappen, Clifford Trumble, Randy Trumble, Timothy Williams, Rodney Wilson, and others.

[46] The first amended consolidated complaint in Cases 7–CA–26062 and 7–CA–26359 had issued 31 December.

Conclusions

The 8(a)(1) Violations

As found supra, Schiattone and the other crew leaders were, at all material times, supervisors within the meaning of Section 2(11) of the Act and were, consequently, also agents of Respondent. Therefore, any threats, coercive statements, or incidents of interrogation engaged in by these individuals are also attributable to Respondent.

Paragraph 8 of the consolidated complaint contains 13 subparagraphs (a through m),[47] each alleging a separate violation of Section 8(a)(1).[48] Paragraph 8(a) alleges that on several occasions beginning 7 July Schiattone threatened Respondent's employees that organizing a union would be futile while paragraph 8(c) alleges that he threatened employees with plant closure if a union successfully organized Respondent's Bay City place of business. The record reflects that about this time, Schiattone told Steve Brown in the presence of Edward Paine and two other employees, that the employees should think twice about organizing a union because if they did so, the Company would close the doors. He added that when he first started working for Respondent, the employees tried to start a union there and the Company threatened to shut the doors if the employees even thought about starting a union. Similarly, immediately after the 9 July union meeting, Schiattone told Jennings that if management up in the main office found out about the union activity, they would close the doors, move everything out, and go to Birch Run. Likewise, the record shows that on 10 July Schiattone told Jennings in Hopfinger's presence that he should back off from organizing Bay Metal Cabinet because without getting Saginaw Control organized it would not do any good; that on 11 July he told Dean that he and Jennings had no chance of getting a union into the plant, that the Company would close the doors; that on 12 July he made a similar statement to Wagener; and that on 13 July he made a like statement to Steve Brown. Thus, the record supports the allegations contained in paragraphs 8(a) and (c) of the complaint, for there can be nothing more futile than for employees to organize a union only to have the employer close the doors after they have successfully done so.[49]

The record reflects that on 10 July Schiattone told William Trask, in the presence of other employees, that if the Union came in, it would not be good because, in that event, he did not think that the employees would have jobs. On 11 July, when Schiattone told Dean that he and Jennings had no chance of getting a union in because the Company would close the doors, he added that the employees would be out of a job. On 13 July Schiattone told Steve Brown that getting a union in was a good way of getting himself fired from his job. I find that the record supports the allegation contained in paragraph 8(b) to the effect that during the week beginning 7 July Respondent, through Schiattone, threatened employees with discharge because of their continued involvement in union organizing activities.[50]

During his 12 July discussion with Wagener, Schiattone told him that the reason that the Company would close the doors if the employees were successful in getting the Union in was that Baldauf did not need the shop, that he could close it down and it would not hurt him at all. He added that the employees at Birch Run had tried to form a union there and had either been laid off or fired because of it. By making this statement Schiattone clearly implied that what happened at Birch Run would happen at Bay Metal Cabinets. I find that Schiattone's statement that employees at Birch Run were fired or laid off for trying to form a union supports the allegation contained in paragraph 8(d) of the complaint.[51]

The record reflects that with the appearance of McInerny in Respondent's parking lot; his distribution of prounion pins, buttons, et al.; the wearing of these items by Respondent's employees; and the clear, overt indication of renewed interest in union organizational activity on the part of certain of Respondent's employees, management became concerned that the Union might be successful in its drive. This concern is clearly indicated by Cumming's statement to Schiattone that if the Union came in, the Company would probably just close down and lay everybody off. The record also reflects that Cummings' message to Schiattone was passed on to the employees. Paragraph 8(e) alleges that Respondent, through Schiattone, in late September, October, and November threatened employees with plant closure if they chose union representation. This allegation is supported by record evidence.[52]

Thus, Tom Wilson credibly recounted that Schiattone told almost the entire shift, ''I wish you guys would hurry up and get the Union in so I can get laid off because we're all going to get laid off if we get the Union in, and then I can draw unemployment.'' Similarly, this allegation is supported by Terry Shawl's testimony wherein he described how he overheard Shiattone tell employee Ted Brown that if the Union got in the Company would simply close the doors and shut the place down. Likewise, Shawl's testimony concerning the incident during which Schiattone pointed to Shawl's union button and commented, ''Yes, a union would be a good idea, but I'd hate to see them close the shop.''[53]

Paragraph 8(g) of the complaint alleges that in late September Respondent, through Schiattone, threatened Respondent's employees that it would cease operations, and later reopen under a different name, in the event they selected a collective-bargaining representative, thereby conveying the impression that support for the Union would be futile. This allegation is supported by the testimony of Terry Shawl wherein he described a conversation between Ted Brown and Schiattone which he had overheard and during which Schiattone had stated that if the Union got in, the Company would simply close the doors; shut the place down; sell the whole works to Harold Johnson, and reopen it as Bay Fabrication.[54] This allegation is also supported, in part, by the testimony of Clifford Trumble wherein he described a conversation in late September during which Schiattone told him that Respondent's employees had tried before to get a union in the shop, but that the Company had just laid the shift off and hired new employees; and that it would be useless for the employees to try to get a union in the plant because the

[47] As amended at the hearing.

[48] Par. 8(f) was withdrawn at the hearing.

[49] *Iron Mountain Forge Corp.*, 278 NLRB 255 (1986).

[50] *Parkview Acres Convalescent Center*, 255 NLRB 1164 (1981).

[51] *Overnite Transportation Co.*, 254 NLRB 132 (1981).

[52] *Iron Mountain Forge Corp.*, supra.

[53] *Quality Aluminum Products*, 278 NLRB 338 (1986).

[54] *Iron Mountain*, supra.

Company would do the same thing again.[55] This allegation is likewise supported by the testimony of Dale Hawes to the effect that he heard Schiattone say three or four times that the employees might as well forget about getting the Union in because if they succeeded, management would close the shop, and more than likely sell it for a dollar, change names along the line, and reopen it with a new crew.[56] Finally, this allegation is supported by Schiattone's admission that he did make the statements ascribed to him. Though Schiattone testified that he was only stating an opinion, I find that he was relaying what he had heard from higher management. He admitted discussing with higher management the probable consequences of a successful union organizational campaign. Only from such conversations could he obtain the necessary information to make the statements he did with such particularity. Indeed, to suggest that they were solely the product of a fertile imagination strains ones credulity.

Paragraph 8(k) of the complaint alleges that Respondent, through Harold Baldauf, coercively interrogated and threatened an employee about his wearing badges supporting the Union. Terry Shawl testified, in this regard, that when he returned from a 3-day layoff he wore a union button and pocket protector for the first time. As he walked past Baldauf in the plant, Baldauf pointed to Shawl's union button and asked him what it was. When Shawl replied that it was decoration, Baldauf asked, ''What is it supposed to mean?'' Despite Baldauf's denial that this conversation took place I credit Shawl that it took place just as he stated. I also find that these were not merely honest questions asked for the purpose of satisfying Baldauf's curosity. Indeed, the button bore the legend, ''Join United Steelworkers of America, AFL–CIO–CLC'' and the pocket protector bore the legend, ''Go Steelworkers'' so that it must have been obvious to Baldauf, or to anyone else who would read, what they were and what they meant. The questions were clearly rhetorical in nature and designed to impress on Shawl the fact that management was aware and interested in his prounion sympathies. In light of Schiattone's numerous threats of the probability of future plant closure and layoffs of union adherents and the actual layoff of the seven union adherents on 14 July, I find the interrogation of Shawl by Baldauf coercive and violative of Section 8(a)(1) of the Act.[57] The allegation contained in paragraph 8(k) of the complaint is also supported by the testimony of Curtis Sauvage concerning his conversation with Baldauf in the weld shop in early October. In this converstion, Baldauf pointed to Sauvage's eyeglass holder bearing the union legend and asked him where he had gotten it. When Sauvage replied that he had found it lying around, Baldauf warned him that he should not be wearing it. As in the case of the Baldauf-Shawl conversation, I find Baldauf's questioning and warning of Sauvage, when considered in light of surrounding circumstances, both coercive in nature and violative of Section 8(a)(1).[58]

Paragraphs 8(h) and (i) allege that early in October, Respondent distributed a ''Personnel Manual'' to its employees containing the language, cited verbatim, supra. Paragraph 8(j) alleges that the cited rules are overly-broad in that they prohibit, absent Respondent's permission, solicitations and the distribution of literature during employees' nonworking time on Respondent's premises. It also alleges that these activities are protected under Section 7 of the Act and that the rules were promulgated by Respondent to squelch the union activities of its employees. In its answer, Respondent admits the allegations contained in paragraphs 8(h) and (i) but denies the allegations contained in paragraph 8(j).

I find, as alleged, that the language contained in the ''Personnel Manual'' as cited is, in fact, too broad and that if the ''Personnel Manual'' contained any other language mitigating or correcting the effect of the cited portion, Respondent would have cited such language or offered a copy of the document. This it did not do. I find also that since the offending rules were distributed during the height of the union campaign, they were distributed in order to squelch the union activities of Respondent's employees. No other explanation either for the distribution of the document or the timing of its distribution was offered by Respondent. Consequently, I find that Respondent violated the Act as alleged in paragraphs 8(h), (i), and (j) of the complaint.[59]

Paragraph 8(1) alleges that sometime during November, Fred May threatened employees with plant closure if their union organizing activities continued. The record supports this allegation inasmuch as Richard Rolfe testified that sometime in November, he and certain rank-and-file employees were present at the packing table awaiting assignment when May made reference to ''the morons in the weld shop signing union cards'' adding that ''Harold [Baldauf] would close the place down if the Union got in there.''

Curtis Sauvage also offered testimony in support of this allegation recounting that May, sometime in November, in the presence of Sauvage, Rolfe, and other employees, stated that the Union was a bad thing and that if the employees voted for the Union, Harold [Baldauf] would close up the shop and everybody would be out of a job. Three nights later, May had occasion to visit the plant again and again brought up the subject of union. He reiterated that the Union coming in would be bad. He then pointed at the union badge which Sauvage was wearing and told him that he should not be wearing it, adding that the employees should not be going with the Union because the Union was going to cost everybody his job. This latter statement easily translates into a threat that continued union activities on the part of the employees would lead to plant closure, the statement made earlier by May, and alleged in paragraph 8(1). As noted supra, such statements are violative of the Act.[60]

Paragraph 8(m) of the complaint was added as an amendment during the hearing and alleges that Baldauf interrogated employees as to how they would vote in a union election. The record reflects that sometime after the petition was filed and before Sauvage was discharged, Baldauf asked him how he was going to vote in the forthcoming election. Thus, the record supports the allegation insofar as there was, in fact, interrogation by management of a rank-and-file employee concerning his vote in a representation election. I find, in light of the surrounding circumstances and the other violations of the Act, that the interrogation was coercive and violative of Section 8(a)(1) of the Act.[61]

[55] *Overnite Transportation*, supra.

[56] *Safety Tank Lines*, 224 NLRB 144 (1976).

[57] *Quality Aluminum Products*, supra.

[58] Ibid.

[59] *Our Way, Inc.*, 268 NLRB 394 (1983).

[60] *Iron Mountain*, supra.

[61] See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The 8(a)(3) and (1) Violations

Paragraph 9 of the consolidated complaint contains seven subparagraphs, (a) through (g) each alleging a violation of Section 8(a)(3) and (1).[62]

Paragraph 9(a) alleges that on 14 July, Respondent discharged/laid off seven employees because of their union activities and the record fully supports this allegation. Thus, the evidence indicates that the seven employees terminated on 14 July had been actively engaged in union activities-proselytizing, organizing, attending meetings, distributing, and signing union cards. Schiattone was aware of all their activities and passed the information on to higher management on orders from May. As soon as May obtained the information from Schiattone and from other sources as to who was involved in the organizing, the seven night-shift employees were unceremoniously terminated en masse.

I find the allegation contained in paragraph 9(a) well substantiated by the evidence and rely on the following factors:

1. The terminated employees engaged in substantial union activities immediately before their discharge.

2. May learned of the union activities of certain of these employees who were eventually discharged and attempted, through Schiattone, to determine the identity of the others.

3. May succeeded, to a large extent, in obtaining the information he sought.

4. Management terminated the union activists immediately after it identified them as such.

5. Schiattone threatened union activists with termination if they continued their activities just before Respondent did, in fact, terminate them, thus reflecting both animosity and a cause-and-effect relationship between the threat and the termination.

6. Management offered to the terminated employees clearly transparent and pretextual reasons for their termination thereby evidencing ulterior motivation. Thus, May told Jennings and Dean that they were being laid off because they were instigators of bull sessions. Although there is no evidence of the existence of any rule against talking on the job, May was aware through Schiattone that Jennings and Dean were the ''instigators'' of union activity. When May stated that they were being laid off because they were instigators of bull sessions, he was telling them, in fact, that they were being laid off because they had been talking to the other employees about obtaining union representation.

Another example of a clearly pretextual reason Respondent's management offered to the terminated employees was the one which May gave to the Trasks. He told them that they were being laid off for lack of work when, in fact, Respondent had already hired new employees to replace them. If there had been a lack of work, Respondent would not have replaced them. Moreover, at the time of the 14 July layoff, the employees were working a 50-hour workweek.

Finally, when the Trasks indicated to May that they did not believe that they were being laid off for lack of work, May shifted his reasons for their layoff to poor productivity and workmanship. The Board has often found that where an employee engaged in union activity is discharged and the employer shifts its reasons for discharge from one basis to another, the reversal in position is indicative of pretext.[63] In the case of the Trasks, the second set of reasons offered by May for their discharge is equally suspect inasmuch as there is no evidence that the Respondent ever advised them prior to their termination that the quantity or quality of their work was unsatisfactory.[64]

7. May, unaware that Fuhrman was a union activist and a card signer, told Schiattone to recall him but only if he had not signed a card. This incident, beyond question, lays bare the true motivation behind the 14 July layoff .

8. Schiattone told Wilson that seven employees had been laid off for trying to start a union. He was, of course, referring to the 14 July layoff and was most certainly basing his statement on information that he obtained from higher management. The record reveals beyond question that Schiattone was deeply involved in the surveillance of the union activities and the supplying of information obtained through this surveillance to May. The termination of the seven employees was the result, in large part, of Schiattone's reports to May. Schiattone's statement to Wilson was neither a mere opinion nor an educated guess. It was an admission that the layoffs were discriminatorily motivated.

For the reasons cited, I find that the allegation contained in subparagraph 9(a) is meritorious and that the layoff of 14 July was discriminatory in nature and violative of Section 8(a)(3) and (1) of the Act.

Paragraph 9(c) of the complaint alleges that on 7 October Respondent reduced the wages of Ross Dean because of his union activities. Record evidence indicates that Dean was hired as crew leader in May and received crew leader's wages when hired. When he was removed as crew leader 4 days later he was told by May that he was too nice a guy to be a crew leader but would continue to receive crew leader's wages because he ''was worth it.''

I credit Dean's description of these events because although May appeared as a witness for Respondent and testified concerning various matters, he was never examined on this subject. From the failure of Respondent to examine May regarding his agreement to permit Dean to continue to receive crew leader's wages, I draw the adverse inference that if May were, in fact, examined on the subject, he would have supported Dean's credited testimony rather than Respondent's position.[65]

Dean continued to receive crew leader's wages from May until 7 October without question or interruption. On the morning of 7 October, McInerny appeared in the Respondent's parking lot distributing to Respondent's employees buttons, badges, and other materials bearing the Steelworkers' logo. Dean accepted certain materials and immediately pinned union buttons to his coat and vest and applied union stickers to the sides of his welding hood thereby indicating to management that his loyalty was still with the Union.

On the afternoon of 7 October, the very first day that the Union's campaign was brought into the open, and Dean began wearing the union buttons and stickers, Cummings called Dean to his office and announced that he would be receiving a reduction in wages because he was no longer a

[62] Par. 9(b) was withdrawn at the hearing. Par. 9(g) alleges that the actions of Respondent described in pars. 9(a) through (f) were taken because of the named employees' activities on behalf of the Union.

[63] *Structural Finishing*, 284 NLRB 981 (1987); *Stoll Industries*, 223 NLRB 51 (1976).

[64] *Prototype Plastics*, 284 NLRB 711 (1987); *Selox, Inc.*, 222 NLRB 497 (1976).

[65] *Structural Finishing*, supra.

crew leader and was working days. When Dean attempted to explain that May had agreed, the previous spring, to let him keep crew leader's wages, Cummings rejected Dean's plea and insisted on the reduction of wages on grounds that more senior employees than Dean were receiving a lesser wage; that they were complaining ahout Dean receiving the higher wage; and that it was not fair to them.

Though, as noted, May was not called to testify on the matter, Cummings was called. His testimony, however, was unconvincing. His explanation that he was unaware that Dean was receiving crew leader's wages until it was brought to his attention by an employee whose identity he could not recall is rejected. It is rejected, not only because it was unsupported by the testimony of any alleged complaining rank-and-file employees, whose name Cummings conveniently forgot, but because when Dean explained to Cummings that May had agreed to permit him to keep the crew leader's salary, Cummings ignored Dean's explanation. Thus, Cummings would have us believe that on the basis of a complaint from a rank-and-file employee he took away from Dean a wage increase or differential granted to him by May, Cummings own boss, without bothering to check out Dean's explanation.

To sum up, I reject Respondent's defense to the allegation contained in paragraph 9(c) because Dean's explanation as to why he continued to receive crew leader's wages is credible; May was never called to testify and deny Dean's explanation; no complaining rank-and-file employee was either identified or called to support Cummings' testimony; and Cummings' action in taking away Dean's crew leader's wages granted to him by May without first checking with May is an unlikely scenario.

Rather than accepting Respondent's explanation of the reason for Dean's wage reduction, I find the following to be the more likely answer: Dean was permitted in the spring to keep his crew leader's pay differential because as May told him, he was worth it. Terminated on 14 July, he was later reinstated at the same rate. When on 7 October, McInerny showed up in the parking lot distributing union buttons and stickers and Dean overtly showed his continued support for the Union by wearing the union buttons and stickers, Respondent reacted. Since there was already a complaint outstanding concerning the 14 July termination of Dean and the other union adherents, it must have been clear that a similar act at this time, would not be judicious. Respondent, therefore, settled for reducing Dean's pay. There being no other credible explanation for the timing of this event, I find that Respondent reduced Dean's wages on the afternoon of 7 0ctober because of his overtly expressed prounion sympathies earlier that day and before, and that the reduction, being discriminatorily motivated, was in violation of Section 8(a)(3) and (1).[66]

Paragraph 9(d) of the complaint alleges that on 9 October, Respondent, by its agent, Paul Van Dorn suspended its employee Ross Dean. This allegation refers quite clearly to the carbon dioxide incident more fully particularized in the factual section of this decision. Most of the facts concerning the incident are not in dispute. It was admitted by Dean that, on the day in question, he failed to properly store a carbon dioxide cylinder. He also admitted that there had issued, 2 weeks earlier, a memorandum which stated that employees failing to properly store carbon dioxide cylinders would be disciplined. According to Dean, the memorandum stated that for the first offense there would be a warning; for the second offense there would be suspension; and for the third offense there would be discharge. According to Van Dorn, however, there were rules posted concerning the proper handling of carbon dioxide cylinders and that the memorandum on the subject provided for a 3-day suspension for the first violation.

There is no question that on 9 October Dean improperly stored the carbon dioxide cylinder and that this was apparently his first violation since the publication and posting of the memorandum on the subject. The question is whether the 3-day suspension which Cummings ordered for Dean was discriminatorily motivated or was in accordance with standard company procedures.

Respondent's animosity toward Dean because of his union activities has already been established. However, if Dean was disciplined by a fair application of a nondiscriminatory rule, in the same manner that other employees were disciplined under similar circumstances, there would be no violation. Dean testified that since this was his first offense, he should only have received a warning just as had two other first offenders. Respondent takes the position that Dean's suspension for his first offense was justified since the memorandum so provided

During the hearing Van Dorn testified that copies of the memorandum concerning the proper storage of cylinders were still available and that Cummings should be in possession of such copies. General Counsel then asked that Respondent produce copies of the memorandum. Respondent's counsel promised to ''look into it.''

The memorandum in question was never produced. It was available, in the control of Respondent and could have been produced if Respondent chose to produce it. Since Respondent chose not to produce the document, I must draw the inference that it would not have helped Respondent's case to do so.[67] Rather, production of the document would most probably support Dean's testimony to the effect that it provided for a warning for a first offense. Since Dean was given a suspension for his first offense, instead of a warning as prescribed by Respondent's own rules, I find that his treatment was disparate.[68] In light of Respondent's history of discrimination against Dean, I find his suspension discriminatorily motivated and in violation of Section 8(a)(3) and (1) of the Act.

Paragraph 9(e) of the complaint alleges that on 27 October and again on 3 November Respondent again suspended Dean because of his union activities. These two incidents must be considered in the context of Respondent's demonstrated antipathy toward Dean, based on his prounion proclivities and the pattern of discrimination already established.

With regard to the 27 October suspension, I credit Dean that Van Dorn, during the week of 2 October offered him and certain other employees an option of working a particular weekday or on the weekend; that Dean chose to work the weekday; and that he did not feel obligated to work the weekend of 25-26 October. Though Van Dorn testified on

[66] *International Hat Co.*, 281 NLRB 336 (1986).

[67] *Reno Hilton*, 282 NLRB 819 (1987).

[68] *Sav-On Drugs, Inc.*, 258 NLRB 1420 (1981); *Clark Manor Nursing Home Corp.*, 254 NLRB 455 (1981).

other matters, he did not testify with regard to Dean's explanation as to why he did not work on the weekend in question. Since Dean's testimony remains uncontradicted, I credit him.[69] In light of the pattern of discrimination against Dean, I find his suspension for not working on 25–26 October discriminatorily motivated and in violation of Section 8(a)(3) and (1) of the Act.

With regard to the 3 November suspension, I credit Dean's testimony that he received a flash burn on Friday, 31 October; advised his supervisors; received treatment for the burn at a clinic both on 31 October and 1 November; and supplied his supervisor with a doctor's excuse. Similarly, I credit Dean's testimony that when he asked Van Dorn why Cummings wanted to see him Van Dorn replied, ''Well, he's lookin' for a reason to can ya.'' Since Van Dorn was in a position to know and did not deny making the statement, I find his statement evidence of discriminatory motivation fitting neatly within the pattern of prior actions taken by Respondent against Dean.

I do not believe that Respondent would have suspended and threatened with discharge a nonunion rank-and-file employee who received an on-the-job injury and provided a legitimate excuse for his absence. Respondent offered no excuse or explanation for its inexplicably unjustified disciplining of Dean for his legitimate absence. I conclude, therefore, that it was part of its discriminatorily motivated harassment of him because of his union activities.[70] Indeed, but for the receipt, by Respondent, of a copy of the newly filed charge on 5 November, while Dean was still on suspension, Cummings might well have gone through with his threat to discharge Dean. I find that, by suspending Dean on 3 November, for discriminatory reasons, Respondent violated Section 8(a)(3) and (1) of the Act.

Paragraph 9(f) of the complaint alleges that on 1 December Respondent discharged Curtis Sauvage because of his union activities. The record reflects that Sauvage was hired 12 July but did not get involved with the union campaign until much later. His involvement and the first clear indication of the Company's knowledge of his involvement is reflected in the late October incident during which Baldauf told Sauvage that he should not be wearing the eyeglass holder with the Steelworkers logo and Sauvage replied that he would wear it until the Company adopted a dress code forbidding it. Baldauf's statement that Sauvage should not be wearing the union logo reflects his concern over Sauvage's prounion position, and Sauvage's insistence that he would continue to wear it despite Baldauf's admonition must have increased the latter's displeasure.

Similarly, when Fred May, in November told Sauvage that he should not be wearing a union badge and that the employees should not be going with the Union because it was going to cost everybody his job, this clearly reflected animosity on the part of management toward prounion employees and toward Sauvage in particular. Clearly, in the eyes of management, Sauvage had placed himself in the enemy camp.

On 5 November, the Union filed the charge in Case 7–CA–26359. This charge included an allegation that Respondent ''suspended and/or terminated'' seven named employees ''in retaliation for organizing activities in behalf of the United Steelworkers of America.'' Sauvage's name was among those listed on the charge. Thus, here was additional evidence which made clear to Respondent that Sauvage was still allied with the Union against the Company.

Surely, management must have been fully aware that Sauvage was prounion from the fact that he wore the Steelworker's symbols and his name appeared on the charge in Case 7–CA–26359 filed by the Union. Nevertheless, Baldauf asked Sauvage point blank how he would vote in the representation election. Sauvage left no doubt when he referred to his not receiving a wage increase for a year and asked, ''How do you think I would vote?'' Thus, he placed himself squarely on the side of the Union.

When Basil asked Schiattone to make a list of employees wearing union buttons, Schiattone complied. This list would have included the names of Sauvage and Dean, and I cannot believe it was being composed for the innocuous reasons supplied to Schiattone by Basil. Indeed, this was a hit list as subsequent events would prove.

Regarding the incidents which occasioned his discharge, Sauvage testified credibly concerning both. First, he accurately explained the procedure necessary to obtain permission to take off weekends, then convincingly testified as to how he correctly followed that procedure. Rolfe did not testify in contradiction. An adverse inference is therefore drawn.[71] Secondly, Sauvage credibly testified concerning the circumstances surrounding the evening of 28-29 November. He truthfully described how he spent his work hours that evening loading and boxing rather than painting; how the cabinets and parts to be painted were unsatisfactory; how Rolfe, the crew leader, required cabinets from both the first and second shift to be resanded and repainted; how Rolfe decided that painting with Duratex should be discontinued; and how Rolfe made the decision to switch to black paint rather than continuing to use the Duratex.

The record reflects that Sauvage did no painting the evening of 28-29 November and was therefore not guilty of poor worhmanship. It also reflects that he was never put in charge of the operation and should not be blamed for failure to properly supervise those who were doing the painting. Despite these facts, Baldauf testified that, after investigation, Sauvage was discharged for the fiasco that occurred that evening because he was head painter on the night shift and, as such, should have made sure that the painting was done correctly. Since Rolfe was the crew leader on the night in question and Sauvage was the one person who neither painted nor mixed the paint, Sauvage was the only employee on the second-shift paint line who was totally innocent of wrongdoing or negligence. Therefore, Baldauf's termination of Sauvage on the grounds that the problem was his fault is obviously a pretext.

When Cummings called Sauvage to his office to tell him that he was being terminated because of the problems on the job caused by the Duratex, Sauvage explained precisely what had occurred, pleading total innocence. Cummings, however, was not interested in what Sauvage had to say since Sauvage's responsibility or lack thereof for the Duratex fiasco was not of primary importance to Cummings. He there-

[69] Since I have found Van Dorn to be a supervisor and since he testified on behalf of Respondent but did not do so with regard to this incident, I draw the adverse inference that had he done so, his testimony would not have supported the Respondent. *Structural Finishing*, supra.

[70] *Curtin Matheson Scientific*, 228 NLRB 996 (1977).

[71] *Structural Finishing*, supra.

fore ignored Sauvage's defensive explanation and changed the subject by complaining that Sauvage had not reported for work Saturday night 29/30 November. When Sauvage insisted that he had gone through the proper procedure by writing a request for permission to have that night off and forwarding it to Cummings through Rolfe, Cummings rejected Sauvage's explanation out of hand. He did not bother to check with Rolfe but simply told Sauvage that he was a lousy worker and fired him.

When, a few days after Sauvage's termination, Rolfe reminded Cummings that he, not Sauvage, had been the crew leader the night of the Duratex problem, Cummings, unperturbed, simply stated that they did not have to worry about it anymore because Sauvage was gone. Cummings' callous remark indicates to me that Sauvage's being to blame or not to blame for the Duratex problem had nothing to do with Cummings' decision to fire him. For, indeed, if Rolfe's confession that he had been in charge the night of the Duratex incident and that Sauvage was not to blame for it were a revelation to Cummings, and if Cummings bore no malice toward Sauvage, he would have reacted quite differently. His subsequent remark, ''teach them for fucking with the union,'' convinces me that Sauvage was discharged because of his union activity and that the Duratex incident was a convenient pretext utilized for the purpose of ridding Respondent of one more union sympathizer. Sauvage's discharge was, I find, discrimatorily motivated and violative of Section 8(a)(3) and (1) of the Act.[72]

Cummings' testimony to the effect that he fired Sauvage because he was not doing his job; the quantity and quality of his work was unsatisfactory; his attendance was bad; his attitude was bad; he did not seem to want to take direction; and he had his own idea of what he should do and when he should do it, is rejected in light of the fact that the record is devoid of any evidence that Cummings or any other member of management ever brought any of these alleged problems to Sauvage's attention or warned him of these shortcomings prior to his discharge.[73] If Sauvage's personnel file contains evidence indicating management's dissatisfaction with Sauvage's work performance, it was not produced at trial. I conclude that none exists. Further, although Cummings testified that he discharged Sauvage only after consultation with four named crew leaders, none of them were called to testify in corrobation of Cummings' testimony. I find consequently, that if called, they would not have supported his testimony, and that the reasons proffered by Cummings for Sauvage's discharge are without foundation.[74]

Paragraph l0(a), (b), and (c) of the complaint alleges that on or about 15 December Respondent laid off its second shift, consisting of 30 or more employees, in retaliation for their union organizing activities. The record supports this allegation. Thus, it is clear that from its very inception the union activity of Respondent's night-shift employees was known to Schiattone and to higher management. Indeed, early in July, May supplied Schiattone with a list of second-shift employees whom he identified as union activists and told Schiattone to keep his eyes and ears open on the second shift to verify his suspicions as to who was involved and who was ''instigating the whole thing.'' He asked Schiattone to identify and add to his list the names of other night-shift employees who might be involved. Schiattone followed May's directions, determined that most of the weld shop employees on the night shift were going to attend the 9 July union meeting and reported his findings to May. As it turned out, seven night-shift employees actually attended the meeting and these seven formed the organizational core of the employees who distributed union cards to other employees on their shift.

Shortly after the 9 July meeting Schiattone began making threats of plant closure to those night-shift employees whom he knew to be involved and specifically told Jennings that if management found out about the union activity it would move everything out and go to Birch Run Welding. Eventually, this turned out to be no empty threat. Similarly, in his conversation with Wagener, Shiattone prophesied that getting the Union in would do them no good because Baldauf did not need the shop; that he could close it right down and it would not hurt him at all; and that the employees at Birch Run had tried to form a union there and had either been laid off or fired because of it. Thus, the threat to close down is clear and the reasons manifest—that Baldauf did not need Bay Metal Cabinets because he could easily move the work to Birch Run Welding, a nonunion shop where he had beaten the Union once by getting rid of union supporters. Ultimately the scenario described by Schiattone was played out by Respondent. In light of Schiattone's role in Respondent's antiunion campaign; his threats against employees; his gathering of information concerning their union activity and his passing on of this information to upper management; and his various conversations with BMC management and with Dean Johnson, I conclude that Schiattone's statements that the work would be moved to Birch Run Welding were not merely opinion, as Schiattone testified, but were, rather, a clear and accurate indication of management's intention.

The precursor to the eventual termination of the night shift in December occurred in July when seven members of the night shift were terminated for union activity. For whatever reason, Harold Johnson of Birch Run Welding was present at the offices of BMC the day the seven night-shift prounion employees were fired. Despite the termination of these employees whom management considered to be the backbone of union activity, this activity continued and Schiattone felt obliged to again warn the night shift, this time through Kelly, that if the organizational drive went too far the company would move the work out to Birch Run Welding.

When, on 5 September, the complaint in Case 7–CA–26062 issued alleging the discriminatory discharge/layoff of the seven employees,[75] Respondent offered to hire them all back, but only to the day shift. Although Respondent, in the meantime, had hired replacements for some or all of the seven discriminatees and put them to work on the night shift, the record offers no explanation as to why the discriminatees were offered day-shift jobs rather than the night-shift jobs which they held at the time of their layoff.

Counsel for the General Counsel, in her brief, suggests that the discriminatees were transferred to the day shift in order to keep them better under surveillance and to curtail

[72] *Hebert Pattern Shop*, 285 NLRB 555 (1987).

[73] *Prototype Plastics*, 284 NLRB 711 (1987); *Selox, Inc.*, 222 NLRB 497 (1976).

[74] *Structural Finishing*, supra.

[75] Five night-shift and two day-shift employees.

further union activity on their part. There being no alternative theory offered, or apparent from the context of the case, I find the suggestion easy to accept and I do so.

Despite the transfer of the union ringleaders to the day shift, however, the replacements hired to take the place of the discriminatees on the night shift continued the organizational activity begun by the discriminatees. Following the 7 October appearance of McInerny in Respondent's parking lot, his distribution of union buttons and stickers, and the overt resurgence of union activity, Schiattone renewed his own and Respondent's antiunion campaign. In the process, Schiattone told Brown, within Shawl's hearing, that if the Union got in, the Company would close the doors, shut the place down, sell the whole works to Harold Johnson (Birch Run Welding), and reopen it as Bay Fabrication. In a similar vein, Hawes testified that he heard Schiattone say three or four times that the employees should forget about the Union coming in because if the Union came in, management would close the shop, sell it for a dollar, change names along the line, and reopen with a new crew. This testimony reflects, in large part, what eventually occurred, i.e., that BMC discontinued its operation when it appeared that the Union was going to succeed in its campaign, and moved the operation to Birch Run.

After the filing of the charge in Case 7–CA–26359 Management Representative Basil requested Schiattone to supply him with a list of employees wearing prounion insignia. Schiattone complied to the extent of naming those prounion employees on the night shift, thus affording Respondent the information necessary to conclude that the strength of union support was still among the employees on the night shift.

After the Union filed its petition on 17 November and before Thanksgiving, Schiattone took the occasion to warn employee Daniel Downing that the Ford Bumper racks upon which the employees had been working, had come from Birch Run Welding, and if management wished to do so, it could take the job back there again.

To summarize, the record reflects that the organizing campaign began in July on the second shift and that management was aware of this fact and continuously kept that shift of employees under surveillance because of it. Finally, management terminated all of the night-shift employees it suspected of union activity. Thereafter, when Respondent was forced to rehire the discriminatorily laid-off employees, it pointedly rehired them for the first shift where it could better keep watch over them. The old night-shift employees not suspected of engaging in union activities and the night-shift replacement employees were told on no less than five separate occasions that if union activity continued, the shop would be closed down, the doors shut and the work transferred to Birch Run, to some other employer or back to the same employer after being renamed and after its employees had been terminated. True to Schiattone's threat, just about the same time that Respondent was signing a Stipulated Election Agreement, it terminated the entire second shift.

Between 3 and 8 December, at least eight night-shift employees were terminated and within a few days Schiattone was advised by Cummings that the end frames, jigs, and equipment which the night shift had been using for production purposes were being transferred to Birch Run Welding. Within a day or so Cummings advised Rolfe that there would be a layoff because there was no work. Cummings gave this explanation although at the time Rolfe and other employees were working 50 hours per week. Respondent not only laid off most of the second shift on or about 15 December but also day-shift employee Robert Hopfinger, one of the seven original prounion employees terminated on 14 July.

Cummings admitted that the object of sending the end frames, jigs, and equipment to Birch Run was to enable Respondent to get rid of its second shift. He admitted also that in choosing to lay off the second shift, no regard was paid to seniority, many first-shift employees being younger in seniority than the night-shift employees laid off. Baldauf also admitted that the jigs and parts for the GM end frames were removed from the Bay Metals Company night shift and sent to Birch Run for production. The only question left to answer is why the transfer took place.

Although the evidence is overwhelming that Respondent threatened its night-shift employees that if they continued their union activity, Respondent would close down and send the work to Birch Run; that the union activity of the threatened employees did, in fact, continue; and that Respondent did shut down its night shift and did, as threatened, transfer the work to Birch Run, Respondent belatedly offers, mostly by intimation, various other explanations for its transfer of the work to Birch Run.

But the action taken by the Respondent immediately following the termination of its night shift adequately explains its reasons for doing so. Thus, a few days after the 15 December layoff Schiattone advised Downing that he did not think any of the night-shift employees would be coming back, and Respondent confirmed Schiattone's statement by letter of 16 December to its employees wherein it informed them that the layoff was permanent and suggested that they seek employment elsewhere.[76] That Respondent chose to layoff its experienced prounion night-shift employees and transfer their work to Birch Run while retaining and hiring just a few new inexperienced employees to replace them can only be explained by the fact that it had just the week before executed a Stipulated Election Agreement and desired to increase its chances of winning the forthcoming election. On 31 December Respondent completed its antiunion campaign by sending the Region a list of permanently laid-off employees pointedly noting that these ''individuals should not be considered eligible to vote in the election scheduled for January 13.''[77] I conclude that Respondent permanently laid off its night shift in retaliation for their having engaged in union organizing activities and to ensure victory in the forthcoming representation election.

Respondent's Defenses

Respondent, in its brief, states that the elimination of the second shift was due to a variety of reasons, among which were problems relative to the quantity and quality of the product, animosity between the first and second shifts, horseplay, and stealing ''which took place primarily on the second shift.''

[76] Compare the modus operandi in *Birch Run Welding*, supra, which also involved one Fred May and one Harold Baldauf.

[77] The results of the 13 January representation election indicate that Respondent's tactics might well have succeeded but for the filing of the instant charges. The tally of ballots reflects that only 9 day-shift employees voted for union representation while 25 voted against representation.

Quantity of Production

Baldauf testified that the company lost a number of long-standing customers in 1986 and by December had completed a number of major work orders. He stated that the same level of manpower was therefore no longer needed since the Company did not have the orders to justify such a large crew. Cummings testified that the company lost money on the production of GM end frames because employees on the second shift could not make production and for this reason, production ceased on this item in December. This was the job, however, which was transferred to Birch Run Welding following the threats to do so if employees persisted in their union activity.

Thus, it would seem that Respondent relies exclusively on the testimony of Baldauf and Cummings to support its position that one of the reasons it laid off the night shift had to do with ''quantity of product.''[78] Apparently, by ''quantity of product,'' Respondent is referring to both its loss of customers and orders and the failure of the company to timely fill the orders of customers retained.

But Baldauf's testimony was not at all convincing. At times his memory seemed poor, at other times selective. I am certain he was stonewalling during General Counsel's examination. Thus, Baldauf testified that he was responsible for putting in the paint line in August 1983 and that this was the start of the corporation, BMC, of which he was one of the incorporators and owners. The paint line, Baldauf stated, was set up to paint parts for its customers and he was active in dealing with these customers in trying to get their approval. When asked who these customers were, however, Baldauf could not remember. Although it is quite conceivable that Baldauf could honestly have forgotten the names of customers with whom he dealt 4 years previously, at the time of his company's incorporation, I cannot believe his testimony when he said that he did not know if, at the time of the hearing, his father was an officer in the corporation,[79] and did not know if there had been any changes in the officers of the corporation since its incorporation. Though Baldauf could not identify his father as the president of Respondent, he had no trouble identifying one of Respondent's customers, the Allen Group, as a company run by Henry Kissenger's brother.

Other questions which Baldauf had difficulty fielding concerned Kerkau Manufacturing Company, a machine shop located in the same building as BMC, and owned by Baldauf's father. Baldauf testified, concerning Kerkau, that he did not know how to pronounce its name, did not know who its officers were and did not know if Kerkau employees sometimes worked for BMC or vice versa though, he conceded, it might be a possibility. Baldauf explained that he did not know about transfers of employees between the companies because he did not get involved in the day-to-day supervision. Elsewhere, however, he described the operation quite adequately and stated that he manages Kerkau more than Fred May, its plant manager. After first stating that he did not know who Kerkau's officers were, Baldauf then surmised that he, himself, might be one. He then reached into his pocket, drew a business card from it and announced whimsically that he was vice president. At one point in his testimony[80] Baldauf stated emphatically that neither he nor any member of his family, other than his father, held an ownership interest in Kerkau. Later, when asked the same question, he stated he might, indeed, have an ownership interest in Kerkau but did not know.[81]

After having witnessed Baldauf's demeanor while he testified and after having analyzed his testimony in its totality, I am forced to conclude that he testified in such a way as to divulge as little information as possible to the General Counsel; that, at times, he refused to take the proceedings seriously; and that when he did attempt to answer questions put to him by General Counsel, in a serious, responsible way, he did so in a manner inclined to benefit Respondent's case rather than to aid the finder of fact discover the truth.

Baldauf testified that the Allen Group accounted for 30-35 percent of BMC's business in 1985 but that in 1986 the percentage ''tapered off.'' Similarly, he testified that BMC had orders to spot weld and paint cabinets for Coats Diagnostic that accounted for 15 percent of its business in 1986 but that this work was completed in 1986 and the order not renewed. The records, he stated, also show that BMC, toward the end of December, completed an order for Dana Corporation for 500 cabinets.

However, even if I were to credit Baldauf which, as noted, I am reluctant to do, the loss of two customers and the completion of an order does not necessarily warrant the conclusion that orders have decreased. Indeed, orders from customers retained may well have increased sufficiently to offset the loss of the Allen Group and Coats Diagnostic accounts. Baldauf did not address this possibility in his testimony. Moreover, were there no new accounts; new found customers? Baldauf did not testify one way or the other concerning this matter.

Contrary to the position taken in Respondent's brief that one reason why the night shift was terminated was because of the loss of orders from the Allen Group and from Coats Diagnostic, Baldauf testified that between June and December 1986 BMC did not have just 1 major customer but 20. General Mobtors was both a direct and an indirect customer through other customers such as Dana Corporation, Birch Run Welding[82] and Saginaw Engineering and Control. BMC also did work directly for Dana Corporation, Fisher, H. Wilson Company, Adelman, Huron Casting, Buick, and quite a few others. It continued to receive orders from and to perform work for same or all of these companies long after the termination of the night shift, right up to the time of the hearing.

Baldauf testified that whenever a sale is made to a customer, the sale is documented with a contract or purchase order number and a record of each business transaction is filed. But none of this available documentation was offered to support Baldauf's naked assertion that the layoff of the night shift was due, in part, to a diminished number of orders. If the available documentation would have supported Baldauf's testimony, I am certain it would have been offered

[78] R. Br. p. 12.

[79] The 1986 Michigan Annual Report lists Baldauf as vice president and his father as president, both as directors.

[80] Tr. 396.

[81] Tr. 851.

[82] Cummings testified that BRW remained BMC's most important customer throughout all relevant periods; that in November, 60 to 70 BMC employees worked on BRW parts while only 15 to 20 worked on parts for other customers.

into evidence. Since it was not, I must conclude that the documentation did not support Respondent's position.[83] I therefore draw the adverse inference that the documentation which was exclusively within the control of Respondent, if analyzed, would indicate that the total number of sales made and orders filled by BMC for its customers would not have warranted termination of the night shift.

Another consideration: If the decrease in sales and orders resulted in less need for manpower on the night shift, why did Respondent hire Bradley Bleshenski on 15 December to work up to 60 hours per week, the same day it laid off the entire night shift.

Cummings testified that the Company lost money on the production of GM end frames because employees on the second shift could not make production and that for this reason production ceased on this item in December. However, Cummings' testimony on this subject, like Baldauf's was unsupported by the testimony of any other witness[84] or by documentary evidence. There is no doubt that BMC had a contract with BRW to produce end frames for General Motors and that BMC ceased its production of the end frames in December and transferred production of this item to BRW. The only question is why they did it; whether it was to undermine the union activity of the night shift and weaken the prounion vote in the upcoming presentation election as charged in the complaint, or to solve a production problem due to the inability of the night shift to meet production requirements.

The record indicates that production figures were kept on every employee both on the night shift and the day shift. It would have been a simple matter for Respondent, during the hearing, to offer these records into evidence to support the testimony offered on the subject by Cummings. It did not do so. I conclude, that if the production records, if analyzed, would indicate that the night-shift employees were far less productive than the day-shift employees, Respondent would have placed these corroborative documents in the record in order to support its position that it terminated the night shift because employees could not make production. Since it did not do so, I shall draw the adverse inference[85] that the production records, if offered into evidence, would show that the night-shift employees did make production and that the transfer of the GM end frames job to BRW was based on some other consideration.[86]

Finally, with regard to the lack of sales and orders as being the reason for the termination of the night shift, the record is clear that at the time of the termination the night-shift employees were working 50-60 hours per week. This is not evidence of a ''tapering off'' of available work. Since I have inferred, from the failure of Respondent to offer individual production records into evidence, that night-shift production per employee was satisfactory, the necessity for those employees to work 50-60 hours must have been due to understaffing. There must have been more work available than could be done by the existing crew and Respondent should have been hiring rather than terminating employees. So the termination must have been motivated by considerations other than lack of production. Moreover, the decision to move the entire GM end frame production, jigs, tools, and equipment to BRW the very next day after the termination of the night shift proves the availability of production requirements. Indeed, at the time of the hearing, June 1987, BRW was still producing end frames for General Motors.

Quality of Production

Respondent offered the testimony of a number of management witnesses to the effect that the night-shift employees were terminated because they produced a poor quality product and that a large percentage of its production was rejected by Respondent's customers thus costing Respondent a great deal of money.

I reject this defense, however, because Respondent offered no documentary evidence to prove the alleged losses actually occurred. No contracts, bills of lading, letters of complaint, or similar proof was placed in the record. If, in fact, the quality of production was as poor as Respondent's witnesses testified, no production records were offered to show that the quality of the product produced by the second shift was any worse than that produced by the first shift. Finally, there is no evidence that management ever brought to the attention of Schiattone or any second-shift rank-and-file employees its general displeasure with the quality of their workmanship as opposed to that of the day-shift employees, prior to the mass firing which took place in December. For these reasons, I reject this defense.

Animosity Between the First and Second Shifts

Respondent contends that a third reason for the elimination of the second shift was the existence of animosity between the first and second shift. With regard to this defense Baldauf testified that the alleged animosity first manifested itself in early July when employees, at shift change, would holler and shout at each other. He stated that this animosity resulted in a loss of production.

I find no support for Respondent's defense that it fired the second-shift employees because of the existence of animosity between them and the first-shift employees. Baldauf gave no particular examples where animosity between the shifts manifested itself in any serious confrontations and no other witnesses were called to support his testimony. Moreover, Respondent's charge that the alleged animosity gave rise to a loss in production was not supported by documentation. Consequently, I reject this defense.

Horseplay, Liquor, and Drugs

Respondent, in its brief, offered horseplay as the fourth reason for termination of the second shift. At the hearing, witnesses described various practical jokes being played by certain employees at the expense of fellow employees. However, these incidents were not reported to upper management at the time; were engaged in during the first shift as often as on the second shift; were witnessed by crew leaders who at times engaged in such activities themselves; and did not

[83] *Reno Hilton*, supra.

[84] Night-shift employee William Trask testified that he was specifically told by Schiattone that the night shift's production was satisfactory and that he, Trask, had heard no complaints about the night shift's production.

[85] *Reno Hilton*, supra.

[86] A similar conclusion is reached and adverse inference drawn with regard to Cummings' testimony concerning the failure of the second shift to meet production of axle racks.

result in reprimand, discipline, or punishment of any kind.[87] I find no connection between the pranks described and the termination of the night shift.

Witnesses testified to the occasional tossing around of small objects among employees. But this practice also occurred on both shifts and when one employee complained to Schiattone about it, he was told to forget about it.

The one witness who testified concerning the water fight, of which Respondent complained, was a crew leader who freely admitted participating in it himself. The snowball fight of which Respondent also complained, the record indicates, was a single incident in which some 30 day- and night-shift employees and supervisors engaged on their own time after punching out.

Witnesses who testified concerning the drinking of alcohol on the night shift included a crew leader who described how 6 months prior to the termination of the night shift, he witnessed several employees drinking each night over a period of several weeks. He admitted, however, that he never reported the practice to higher management and no one received any reprimands, discipline, or punishment. Other employees testified to having seen this same crew leader, himself, drinking beer on the job.

Cummings testified that ever since he was first employed by Respondent in August, he found beer cans in great numbers all around the plant, in the bathrooms, and in the parking lots. He did not testify that the drinking of beer was limited to night-shift employees but stated only that he did not know who the beer drinkers were. No attempt was made to stop the practice until after the resurgence of the union organizing campaign, after which the entire night shift was laid off, ostensibly because a single beer can was found.

As to the use of drugs, one crew leader testified that back in June he noted that several night-shift employees would leave their work stations and slip out to the parking lot to smoke marijuana. He did not, however, report these incidents so that management remained unaware and the use of drugs on these occasions could not have been a consideration in management's decision to terminate the night shift. Interestingly, however, three employees were terminated in October or November when it was discovered that they were using drugs, but these employees were day-shift employees.

In summary, the testimony concerning horseplay and the use of alcohol and drugs convinces me that the termination of the night shift had nothing to do with these matters.

Thievery

The fifth and final reason which the Respondent gave for the termination of the second shift was thievery. It is patently clear from the record that there was, indeed, some thievery at the plant involving thefts from both the Company and from the employees. There was, in fact, the theft of a cabinet by employees on the night shift in August or September which was never reported to management prior to the termination of the night shift the following December. On the other hand, there was the theft in September of a grinder which did come to the attention of management and which did result in the decision by management that second-shift employees could no longer park in the rear parking lot but would henceforth have to park in the front lot. Obviously management suspected the second shift of the theft and was concerned about it. Just as obvious was the fact that management was not nearly as concerned about employees stealing from each other since nothing was ever done when employees stole from each other even when the fact was reported to management.

I conclude, based on the testimony of all witnesses testifying on the matter, that there was thievery at the plant and that Respondent suspected night-shift employees of the theft. Management did not know for a fact, however, that the thefts were perpetrated by second-shift employees or, if so, by which of them. I am convinced, however, that since the last theft that came to the attention of management occurred months before the termination of the second shift, that the thefts had nothing to do with the termination of the second shift.

Summary

In summation, I find that Respondent's explanation, the five reasons it gives for terminating the second shift in December 1986, is unsupported by the evidence. Rather, I find that Respondent threatened the prounion night-shift employees that unless they abandoned their organizing efforts management would close Bay Metal Cabinets, terminate its employees, and move the work to Birch Run Welding. Further, I find that the prounion night-shift employees continued their union activities and that Respondent, true to its warning, implemented the very program it threatened. It closed down the night shift, terminated those employees, and sent the work to Birch Run Welding. I find that by doing so, Respondent violated Section 8(a)(1) and (3) of the Act.

The General Counsel has made a strong prima facie showing that the dischargees' union activities were the motivating factor in Respondent's decision to discharge them. For reasons set forth supra, I find that Respondent has failed to show that they would have been discharged even in the absence of their union activity. Accordingly, I conclude that Respondent discharged or permanently laid off the employees alleged as discriminatees in the complaint because of their union activities, in violation of Section 8(a)(1) and (3) of the Act.[88]

Case 7–RC–18231

Objections

In the Regional Director's Report on Objections and Determinative Challenged Ballots which issued 9 March 1987, it was accurately determined that the issues raised by the objections were identical to those raised by the allegations described in paragraph 10 of the second amended consolidated complaint. Having found that the allegations contained in paragraph 10 are meritorious, I find that the objections filed in Case 7–RC–18231 are likewise meritorious.

Challenges

In the same document the Regional Director made the following determination:

[87] *Prototype Plastics*, supra; *Selox, Inc.*, supra.

[88] *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (lst Cir. 1981).

> Inasmuch as the charges filed in Cases 7–CA–26062, 7–CA–26359, and 7–CA–26573 allege that many of the challenged voters were unlawfully terminated and the permanent layoffs of employees on the second shift were discriminatorily motivated, and it having been concluded that reasonable cause exists upon which to issue a Second Amended Consolidated Complaint in such regard, the undersigned concludes that many of the eligibility issues herein are affected by the outcame of the unfair labor practice allegations described above in paragraphs 8 through 10 of the Second Amended Consolidated Complaint, and that the eligibility issues should therefore be heard and considered simultaneously by an Administrative Law Judge of the Board.

Consequently, in accordance with the Regional Director's determination, based on the Findings of Fact, supra, I make the following recommendations with regard to eligibility:

Paul Van Dorn

Van Dorn was challenged by the Petitioner on the grounds that he is a statutory supervisor. The Employer contends that Van Dorn is not a supervisor and is eligible to vote. I have found Van Dorn to be a supervisor within the meaning of the Act. He is therefore not eligible to vote.

Edward Schiattone

Edward Schiattone was challenged by the Petitioner and the Employer. The Petitioner contends that he is ineligible because he is a statutory supervisor. The Employer contends that he is not a supervisor but that he is ineligible because on 15 December 1986, he was permanently laid off. Inasmuch as I have found Schiattone to be a supervisor within the meaning of the Act, I also find him not eligible to vote.

Curtis Sauvage

Curtis Sauvage was challenged by the Employer because he was discharged on 28 November 1986. The petitioner contends that he was unlawfully discharged and is currently named as a discriminatee in subparagraph 9(f) of the second amended consolidated complaint. Inasmuch as I have found that Sauvage was terminated because of his union activity in violation of Section 8(a)(1) and (3) of the Act, I also find that he *is* eligible to vote. Accordingly, I shall recommend that the challenge to his ballot be overruled.

Kenneth Trask

Kenneth Trask was challenged by the Board because his name was not on the voter eligibility list. The Petitioner contends that he is eligible because he is named as a discriminatee in subparagraph 9(a) of the second amended consolidated complaint. The Employer contends that he is ineligible because he was permanently laid off on 20 October 1986.

The record supports Petitioner's contention that Kenneth Trask is named as a discriminatee in subparagraph 9(a) of the second amended consolidated complaint which alleges his discriminatory discharge on 14 July 1986. However, the record also indicates that he was recalled in September to the day-shift job from which he had been discharged. While there is nothing in the record to support the Employer's contention that Kenneth Trask was permanently laid off on 20 October, there is documentation indicating that he was permanently laid off 1 November 1986 and that his name did not thereafter appear on the eligibility list. There being neither allegation nor evidence that Trask's layoff on 1 November was discriminatorily motivated, I find him not eligible to vote in the election and consequently shall recommend that the challenge to his ballot be sustained.[89]

Ross Dean

Ross Dean was challenged by the Board because his name was not on the voter eligibility list. The Employer challenged his ballot on the grounds that he was discharged on 26 November 1986. The Petitioner contends that he is eligible because he is named as a discriminatee in subparagraph 9(a) of the second amended consolidated complaint.

The record indicates that Dean's last day of work was 17 November, the day of the fire at the plant. Although Respondent apparently attempted to contact Dean between 18 and 22 November to have him report to work, Dean never returned to the plant. He was discharged on 26 November. Inasmuch as there is no allegation nor evidence to indicate that his discharge was discriminatorily motivated, I conclude that Dean was no longer an employee of the Respondent when he cast his ballot. I shall therefore recommend that the challenge to his ballot be sustained.[90]

Thomas Wilson

Thomas Wilson was challenged by the Board because his name was not on the voter eligibility list. The Petitioner contends that he is eligible to vote but offers no explantion. The Employer contends that he is ineligible because he was discharged on 25 November 1986.

The record indicates that Wilson was terminated 25 November 1986. His name did not appear on the eligibility list. Though his name appeared in Section l0(c) of the complaint along with other night-shift employees as one of those discriminatorily terminated on 15 December, his placement there appears to be in error. From the record it would appear that Wilson was terminated for cause on 25 November. I therefore find him ineligible to vote and recommend that the challenge to his ballot be sustained.[91]

Darryll or Darrell McMullen

Darryll McMullen was challenged by the Board because his name was not on the voter eligibility list. The Petitioner contends he is eligible to vote but offers no explanation. The Employer contends that he is ineligible because he voluntarily quit on 3 December 1986.

The record appears to indicate that the Employer, at the hearing, abandoned its position that McMullen voluntarily quit his job on 3 December 1986. Instead, counsel for Respondent entered into a stipulation to the effect that McMullen was laid off on 3 December along with a number of other second-shift employees. Inasmuch as General Counsel has alleged and I have concluded that the second-shift layoff was discriminatorily motivated, I find that McMullen is eligible to vote and recommend that the challenge to his ballot be overruled.

Dale Hawes, Dan Downing, Steve Brown, Edward Paine, Terry Shawl, Richard Rolfe, Roger Kelly, Clifford Trumble, Patrick Draves, Ken Jolin, Jr., Steven Estes, Norman Dean Jr., and Rick Campbell

---

[89] *Spray Sales & Sierra Rollers*, 225 NLRB 1089 (1976).

[90] Ibid.

[91] Ibid.

These employees were all challenged by the Employer because they were permanently laid off between 3 and 12 December. I have found, however, that their layoffs were discriminatorily motivated and in violation of Section 8(a)(1) and (3) of the Act. Consequently, I find that they are eligible to vote and recommend that challenges to their ballots be overruled.

Robert Hopfinger

Robert Hopfinger was challenged by the Employer because he was permanently laid off on 13 December 1986. The Petitioner contends that he is eligible to vote but offers no explanation.

I have found that Hopfinger was discriminatorily discharged on 14 July. I have found also that when he was recalled, he was placed on the first shift in order to keep him under the watchful eye of upper management so that he could not continue to engage in union activity among the second-shift employees. When the Employer decided to terminate the second shift to rid itself of its prounion employees it also got rid of Hopfinger, the last remaining employee of the core group which it had discharged in July for the same reason. Under these circumstances and also because Hopfinger was never reinstated to his proper position on the night shift following his discriminatory discharge on 14 July,[92] I find him to be eligible to vote and recommend that the challenge to his ballot be overruled.

To summarize, it is recommended that the challenges to the ballots of the following individuals be sustained: Paul Van Dorn, Edward Schiattone, Kenneth Trask, Ross Dean, and Thomas Wilson.

And it is recommended that the challenges to the following individuals be overruled:

Curtis Sauvage	Roger Kelly
Darryll McMullen	Clifford Trumble
Dale Hawes	Patrick Draves
Dan Downing	Ken Jolin, Jr.
Steve Brown	Steven Estes
Edward Paine	Norman Dean, Jr.
Terry Shawl	Rick Campbell
Richard Rolfe	Robert Hopfinger

If the Board should agree with my disposition of the challenges, it will find, as I do, that they are no longer sufficient in number to affect the final results of the election.[93] I therefore recommend that the challenged ballots not be counted. However, inasmuch as I have found the objection to the election to be meritorious, I recommend that the election be set aside and a new election conducted.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operation described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[92] *Deauville Hotel*, 259 NLRB 897 (1982); *Hit'N Run Food Stores*, 231 NLRB 660 (1987); *Super Tire Stores*, 236 NLRB 877 (1978).

[93] *Best Motor Lines*, 82 NLRB 269 (1949).

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3), of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as I have found that certain employees were discriminatorily terminated, I shall recommend that Respondent be required to offer them full and immediate reinstatement, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[94]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees that organizing a union would be futile; threatening its employees with discharge because of their continued involvement in union organizing activites; threatening its employees with plant closure if a union successfully organized its Bay City place of business; threatening its employees with termination by telling them that other employees who had engaged in union activities had been discharged; threatening its employees that it would cease operations and later reopen under a different name in the event they selected a collective-bargaining representative, thereby conveying the impression that support for the Union or any labor organization would be futile; threatening its employees by telling them that they should not be wearing badges bearing union slogans or logos and interrogating them concerning their wearing of prounion emblems and about how they would vote in a union repesentation election; and distributing personnel manuals containing overly broad no-solicitation and no-distribution rules in order to squelch the union activities of its employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section (a)(l) of the Act.

4. By the acts and conduct summarized below, Respondent has discriminated with respect to the hire, tenure, or other terms and conditions of employment of its employees in order to discourage their membership in a labor organization and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act:

(a) Discharging/laying off employees William Trask, Kenneth Trask, Ross Dean, Robert Jennings, Robert Hopfinger, Brian Wagener, and Anthony Fuhrman on 14 July 1986;

(b) Reducing the wages of employee Ross Dean on 7 October 1986;

(c) Suspending employee Ross Dean on 9 and 27 October and 3 November 1986;

(d) Discharging employee Curtis Sauvage on 1 December 1986;

(e) Eliminating its second shift and permanently laying off its night-shift employees.

[94] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[95]

ORDER

The Respondent, Bay Metal Cabinets, Inc., Bay City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that organizing a union would be futile.

(b) Threatening employees with discharge because of their continued involvement in union organizing activities.

(c) Threatening employees with plant closure if a union should successfully organize its Bay City place of business.

(d) Threatening employees with termination by telling them that other employees who had engaged in union activities had been discharged for doing so.

(e) Threatening employees that it would cease operations and later reopen under a different name in the event they selected a collective-bargaining representative.

(f) Threatening employees by telling them that they should not be wearing badges bearing union slogans or logos and interrogating them concerning their wearing of prounion emblems and about how they would vote in a union representation election.

(g) Distributing personnel manuals containing overly broad no-solicitation and no-distribution rules.

(h) Discouraging membership in a labor organization by discharging, laying off or suspending employees; eliminating shifts; reducing wages of employees; or in any other manner discriminating against employees with respect to their wages, hours, or tenure of employment.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following action designed to effectuate the policies of the Act.

(a) Offer immediate reinstatement to employees William Trask, Kenneth Trask, Ross Dean, Robert Jennings, Robert Hopfinger, Anthony Fuhrman, and Brian Wagener to their former positions of employment or, if such positions no longer exist, to substantially equivalent positions, without prejudice to the seniority or other rights or privileges previously enjoyed, and expunge from its files any reference to the unlawful discharges of these employees and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(b) Make William Trask, Kenneth Trask, Ross Dean, Robert Jennings, Robert Hopfinger, Brian Wagener, and Anthony Fuhrman whole for any loss of pay they may have suffered as a result of their terminations on 14 July in the manner set forth in the remedy section of this decision.

(c) Make Ross Dean whole for any loss of pay he may have suffered as a result of the discriminatory reduction in wages he suffered beginning 7 October and as a result of the discriminatory suspensions he suffered on 9 and 27 October and 3 November 1986, and expunge from its records any reference to the unlawful actions taken against him and notify him in writing that this has been done and that the suspensions will not be used against him in any way.

(d) Offer Curtis Sauvage immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of his termination, in the manner set forth in the remedy section of this decision and expunge from its personnel files and other records any reference to the discriminatory action taken against him and notify him in writing that this has been done and that his discharge will not be used against him in any way.

(e) Reinstate the second shift and offer to the employees on the second shift, discriminatorily laid off in December 1986, immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a resut of their terminations, in the manner set forth in the remedy section of this decision.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in complying with the terms of this Order.

(g) Post at its plant in Bay City, Michigan, copies of the attached notice marked ''Appendix.''[96] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted in Case 7–RC–18231 on 13 January 1987, be set aside and that the Regional Director for Region 7 conduct a second election at a time he deems appropriate.

[95] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[96] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

In recognition of these rights we notify our employees that:

WE WILL NOT threaten employees that organizing a union will be futile.

WE WILL NOT threaten employees with discharge because of their continued involvement in union organizing activities.

WE WILL NOT threaten employees with plant closure if a union should successfully organize our Bay City place of business.

WE WILL NOT threaten employees with termination by telling them that other employees who had engaged in union activities had been discharged for doing so.

WE WILL NOT threaten employees that we will cease operations and later reopen under a different name in the event they select a collective-bargaining representative.

WE WILL NOT threaten employees by telling them that they should not be wearing badges bearing union slogans or logos.

WE WILL NOT interrogate employees concerning their wearing prounion emblems or about how they will vote in a union representation election.

WE WILL NOT distribute personnel manuals containing overly broad no-solicitation and no-distribution rules.

WE WILL NOT discourage membership in a labor organization by discharging, laying off, or suspending employees; eliminating shifts; reducing wages of employees; or in any other manner discriminating against employees with respect to their wages, hours, or tenure of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer William Trask, Kenneth Trask, Ross Dean, Anthony Fuhrman, Robert Jennings, Robert Hopfinger, and Brian Wagener immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges.

WE WILL make William Trask, Kenneth Trask, Ross Dean, Robert Jennings, Robert Hopfinger, Brian Wagener, and Anthony Fuhrman whole for any loss of pay they may have suffered as a result of their terminations on 14 July.

WE WILL make Ross Dean whole for any loss of pay he may have suffered as a result of the discriminatory reduction in wages he suffered beginning 7 October and as a result of the discriminatory suspensions he suffered on 9 and 27 October and 3 November 1986.

WE WILL offer Curtis Sauvage immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of his termination.

WE WILL reinstate the second shift.

WE WILL offer to the employees on the second shift discriminatorily laid off in December 1986 immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of their terminations.

WE WILL remove from our files any references to the suspensions and discharges of the above employees and WE WILL notify them in writing that this has been done and that the discharges will not be used against them in any way.

All our employees are free to become or remain, or refrain from becoming or remaining, members of a labor organization.

BAY METAL CABINETS, INC.